

ORIGINAL



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

STATE OF OKLAHOMA,

Appellant,

v.

KARL ALLEN FONTENOT,

Appellee.

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Case No. S-2024-205

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT - 2 2025

SUMMARY OPINION

SELDEN JONES
CLERK

LUMPKIN, PRESIDING JUDGE:

Karl Allen Fontenot was charged by Information in the District Court of Pontotoc County Case No. CRF-1984-183, on November 7, 1984, with the crimes of Robbery with a Dangerous Weapon, in violation of 21 O.S.Supp.1982, § 801 (Count I), Kidnapping, in violation of 21 O.S.1981, § 741 (Count II), and Murder in the First Degree, in violation of 21 O.S.Supp.1982, § 701.7 (Count IV), stemming from the 1984 robbery, abduction, and brutal murder of twenty-four-year-old Donna Denice Haraway, a convenience store clerk, newlywed, and aspiring schoolteacher who worked at the McAnally's store in Ada, Oklahoma.

A brief procedural history of this case is necessary. Appellee was

tried twice by the State and convicted of all charged crimes both times, with the jury assessing the death penalty as punishment. After his second trial, this Court determined on direct appeal that Appellee was entitled to a new sentencing hearing and in exchange for a sentence of life without the possibility of parole, Appellee agreed to forego jury re-sentencing. *Fontenot v. State*, 1994 OK CR 42, ¶ 1, 881 P.2d 69, 73-74.

Years later, on July 24, 2013, Appellee sought post-conviction relief in the District Court of Pontotoc County, which was denied, and the denial was affirmed by this Court on post-conviction appeal. *Karl Fontenot v. State*, PC-2015-76, October 15, 2015 (unpublished). On February 24, 2016, Appellee sought federal habeas corpus relief in the United States District Court for the Eastern District of Oklahoma. *Fontenot v. Allbaugh*, 402 F.Supp.3d 1110 (E.D. Okla. 2019). The Eastern District Court granted a conditional writ, based upon its finding of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963),¹ ordering the State to retry or release Appellee from custody within

¹*Brady* held, “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.*, 373 U.S. at 87-88.

120 days of the entry of the judgment.

The State perfected a timely appeal to the Tenth Circuit Court of Appeals, *Fontenot v. Crow*, 4 F.4th 982 (10th Cir. 2021). A majority of the panel agreed with the lower court that Appellee was entitled to habeas relief based on an alleged violation of *Brady*. “We thus affirm the district court’s finding of nonharmless error based on *Brady* violations, without reaching the rest of Mr. Fontenot’s constitutional claims.” *Fontenot*, 4 F.4th at 1082. The Tenth Circuit ordered the State to retry Appellee or release him from custody within 120 days from the date of its order.

On August 30, 2022, the Oklahoma Attorney General's Office appointed District 5 District Attorney, Kyle Cabelka, to initiate new trial proceedings pursuant to 19 O.S.2021, § 215.9. On October 28, 2022, DA Cabelka filed a Special Entry of Appearance on behalf of the State, as well as a Motion to Set New Trial Date and Request for Initial Status, seeking to commence trial proceedings, as contemplated by the conditional writ of federal habeas.

The Oklahoma Supreme Court appointed Tulsa County Associate District Judge Clifford J. Smith to preside over trial proceedings in this case. On August 1, 2023, the State filed two pre-

trial pleadings: (1) “Motion for Hearing on Admissibility of Recorded Confession by Appellee on 10-19-84”; and (2) “Motion to Declare Witnesses Unavailable and Allow Use of Transcripts from Previous Testimony.” Appellee filed a written response to both motions on October 20, 2023. The trial court held hearings on the motions on November 30, 2023, and December 15, 2023. The trial court announced that, although it was not bound by the federal courts’ findings, it would give “great persuasive authority” to the federal district court’s habeas conclusions, and that, in that sense, “the issue of the reliability of Appellee’s confession was fully litigated by the parties and determined fatally unreliable.” The trial court did not however, make a definitive ruling at that time on the Appellee’s request that the confession be suppressed.

On February 23, 2024, the parties convened for a final ruling on Appellee’s motion to suppress the confession. Before the trial court announced its ruling, Appellee indicated that the parties had reached agreed-upon factual stipulations and set forth the following stipulations of fact:

Stipulation Number 1. We stipulate to the findings of facts and the conclusions made by the Tenth Circuit in its July 13, 2021,

opinion.

Number 2. We stipulate that there has been no new evidence developed since the Tenth Circuit's opinion was handed down.

Number 3. In light of the Tenth Circuit's findings, the absence of any new evidence since the Tenth Circuit's opinion was handed down, the loss of so much of the evidence from the original trial and the unavailability of many of the witnesses has compromised both sides' ability to move forward with this case.

The State agreed that these factual stipulations were correct. The parties then rested. Immediately thereafter, the trial court issued the following order: "[b]oth sides resting, the Court having reviewed extensively on a previous occasion based on [sic] motions for advisory opinions is prepared at this time to sustain the motion to suppress the Appellee's confession in this matter. This gives rise to a right on the part of the State to appeal." The State promptly announced an intent to appeal in open court. When the State queried whether a written order or further findings would be forthcoming, the trial court refused, explaining that the record was sufficient for the State to bring an appeal.

Following this oral order, the State, by and through the Attorney

General, timely filed a Notice of Intent to Appeal and Designation of Record in the trial court on March 4, 2024. A certified copy of the same was filed in this Court on March 13, 2024. The State perfected its appeal by timely filing a Petition in Error in this Court on May 22, 2024, pursuant to 22 O.S.Supp.2022, § 1053(6).

THE TRIAL COURT ABUSED ITS DISCRETION IN PREMATURELY SUPPRESSING THE APPELLEE'S CONFESSION PRIOR TO TRIAL BECAUSE THE ISSUE OF THE CONFESSION'S ADEQUATE CORROBORATION IS A QUESTION THAT SHOULD BE DETERMINED AT THE TIME OF TRIAL, ONCE THE STATE HAS HAD THE OPPORTUNITY TO FULLY MARSHAL ITS CORROBORATING EVIDENCE IN THESE RETRIAL PROCEEDINGS.

The State argues the District Court abused its discretion in granting Appellee's motion to suppress his confession based upon insufficient corroboration since no evidence regarding the confession has been presented in the new trial. The new trial ordered as habeas relief has not commenced. We first address the propriety of the State's appeal.

The State titled the subject motion: "Motion for Hearing on Admissibility of Recorded Confession by Defendant on 10-19-84." At the initial hearing, DA Cabelka voiced concern about the effect on Appellee's confession of the Tenth Circuit's grant of habeas relief

based upon its finding of *Brady* violations, some of which related to Appellee's confession. He expressed this concern due to the fact that the latest opinion of this Court found the confession admissible, despite Appellee's direct appeal claim that insufficient evidence corroborated his confession. Appellee urged his position that the trial court was bound by the findings of the Tenth Circuit and the Eastern District regarding the confession and that the confession should be ruled "not admissible for any purpose at trial."

Neither party presented evidence at the subject hearing. The parties argued their respective positions and findings of this Court, the Tenth Circuit and the Eastern District. The trial court took the matter under advisement. Prior to the trial court's final ruling, the parties stipulated to the "findings of facts and conclusions" made by the Tenth Circuit in *Fontenot*, 4 F.4th 982. They stipulated "there has been no new evidence" since the Tenth Circuit's opinion and that both sides' ability to move forward in the case was compromised due to the Tenth Circuit's findings, the lack of new evidence since the Tenth Circuit opinion, the loss of evidence from the last trial and unavailability of witnesses. After receiving that stipulation, the trial court ruled it would ". . . sustain the motion to suppress the

Appellee's confession in this matter. This gives rise to a right on the part of the State to appeal."

Given the trial court's ruling, it treated Appellee's pleadings filed in response to the State's motion as seeking suppression of Appellee's confession to Haraway's murder. We concur and find this appeal properly before this Court. Appellee's motion to dismiss the State's appeal is DENIED.

In appeals brought pursuant to 22 O.S.Supp.2022, § 1053, this Court reviews the trial court's decision to determine if the trial court abused its discretion. *Delso v. State*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194; *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117.

Appellee received relief from the Tenth Circuit based upon its determination that the State violated the tenets of *Brady*, i.e., it failed to provide certain evidence favorable to Appellee where the evidence

was material to guilt or punishment. *See Fontenot*, 4 F. 4th at 1081-82. The Tenth Circuit's ruling ordered Appellee's release from custody unless the State commenced new trial proceedings against him within a certain time. The State elected to retry Appellee.

To reiterate, the Tenth Circuit entered its order based solely upon its finding of a *Brady* violation. The Court specifically pointed out it was not addressing the merits of any other constitutional claims Appellee raised. In a new trial, the State can cure the *Brady* violation found by the Tenth Circuit by providing the previously withheld material to the defense in accordance with our statutes.

The Oklahoma Statutes provide the following when a new trial is ordered to occur:

A new trial is a reexamination of the issue in the same court, before another jury, after a verdict has been given. **The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew** except of witnesses who are absent from the state or dead, in which event the evidence of such witnesses on the former trial may be presented; and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment or information.

22 O.S.2021, § 951(A). (Emphasis added). "Under this provision,

when Appellee was granted a new trial, he was placed in the same position as if his first trial had never occurred. That being so, Appellee had the opportunity to call witnesses in defense of the charges brought against him, and the State had the opportunity to call witnesses to prove Appellee committed the offense.” *Martinez v. State*, 1999 OK CR 33, ¶ 18, 984 P.2d 813, 821.

In this case, Appellee’s new trial has not commenced. The material the Tenth Circuit had before it was gleaned from the prosecution’s file created during its investigation of Haraway’s murder consisted of some witness statements, as well as some additional information obtained many years after the investigation. While the State did stipulate to “findings of facts and conclusions” made by the Tenth Circuit and that “there has been no new evidence” since the Tenth Circuit’s opinion, those stipulations were for purposes of the subject hearing only. This is so because at this point in the retrial process, neither party knows what witnesses it will call or if its witnesses are available. There has been no evidence at all presented in the new trial.

The Oklahoma Evidence Code provides guidance and some insight into when hearings on the admissibility of a confession are to

occur. "Hearings on the admissibility of confessions shall be conducted in all cases out of the hearing of **the jury**." 12 O.S.2021, § 2105(D) (Emphasis added). Thus, the statute contemplates presentation of confession corroboration evidence during trial, with a hearing on any objection occurring outside the jury's presence. Our cases follow this statute and issues regarding admission of a confession based upon lack of corroborating evidence are initially addressed by the trial court upon proper presentation of the evidence and presented upon direct appeal if a defendant is aggrieved by the trial court's decision. *See Smith v. State*, 2007 OK CR 16, ¶¶ 62-64, 157 P.3d 1155, 1175 (determining sufficient corroborating evidence presented at trial supported admission of the defendant's confession); *Short v. State*, 1999 OK CR 15, ¶ 36, 980 P.2d 1081, 1097 ("After reviewing Appellant's confession, the independent corroborative evidence and the alleged inconsistencies, we find that his confession was trustworthy. Accordingly, it was competent evidence for the jury to consider and find no error in its admission."); *Rogers v. State*, 1995 OK CR 8, ¶¶ 35-37, 890 P.2d 959, 975-76 (summarizing trial evidence which corroborated defendant's inculpatory statements to law enforcement and finding that evidence

sufficient to allow the jury to determine those statements were trustworthy.).

Concerning evidence from a prior trial which was discredited then subsequently allowed in a retrial, this Court addressed such a scenario in *Martinez*. There, Appellant contended on direct appeal of his retrial that a State's witness's testimony should not have been admitted because the witness's testimony was discredited by this Court in Appellant's previous direct appeal. *Id.*, 1999 OK CR 33, ¶ 15, 984 P.2d 813 at 820. In denying Appellant's claim, this Court cited Section 951(A) and after reviewing the witness's testimony, held that the jury could consider the testimony, and no abuse of discretion occurred in the trial court's admission of the subject testimony. *Id.*, 1999 OK CR 33, ¶ 20, 984 P.2d 813 at 821.

Appellee seeks to rely solely upon the material the Tenth Circuit used in reaching its decision for his position that his confession is inadmissible, but that is not what Section 951(A) requires. Rather, it demands that Appellee's new trial proceed as if "no trial had been had" with presentation anew of witness testimony and all evidence. In this hearing, the District Court made its suppression decision without any knowledge of what the State's corroboration evidence

would be at trial because the State did not know what that evidence would be.

As shown above, a defendant can contest the admission of his confession based upon lack of corroborating evidence at trial, but such contest must occur after the subject evidence is properly presented. That did not happen in this case. The District Court abused its discretion in granting the motion to suppress Appellee's confession.

DECISION

The decision of the District Court of Pontotoc County granting Appellee's motion to suppress is **REVERSED**. Appellee's Motion to Dismiss is **DENIED**. The matter is **REMANDED** for further proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC
COUNTY THE HONORABLE CLIFFORD SMITH, ASSOCIATE
DISTRICT JUDGE**

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OPINION BY: LUMPKIN, P.J.

MUSSEMAN, V.P.J.: Concur in Part/Dissent in Part

LEWIS, J.: Concur

HUDSON, J.: Concur

ROWLAND, J.: Concur in Result

MUSSEMAN, V.P.J., CONCURRING IN PART/DISSENTING IN PART:

While I agree that the trial court could not make a final determination on whether there was sufficient corroborating evidence of the Appellee's confession pretrial, I believe that holding to be dispositive of our jurisdiction over the appeal.

At issue here is Section 1053(6) which provides that the State may appeal to this Court "[u]pon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21" 22 O.S.Supp.2022, § 1053(6).¹ When reviewing an appeal by the State to this Court, we must look to the "nature of the judgment or order below to ascertain if it falls within Section 1053's jurisdictional limits." *State v. Gilchrist*, 2017 OK CR 25, ¶ 10, 422 P.3d 182, 185. In doing so, "we review the substance of the relief requested regardless of the title affixed to the motion or pleading." *Id.* However, we must remain mindful that the statutory grant of an appeal right

¹ Appellee is charged with, among other crimes, Murder in the First Degree, in violation of 21 O.S.Supp.1982, § 701.7. Murder in the First Degree is listed within Section 13.1 of Title 21, satisfying the final requirement of the statute.

to the State “cannot be enlarged by construction.” *State v. Campbell*, 1998 OK CR 38, ¶ 6, 965 P.2d 991, 992.

As the majority correctly holds, “a defendant can contest the admission of his confession based upon lack of corroborating evidence at trial, but such contest must occur after the subject [corroborating] evidence is properly presented.” *Supra* Summary Opinion p. 13. As a result, the trial court merely had the authority to issue an advisory pretrial ruling on the evidence the parties presumed would be admitted. Even under the most expansive definition for suppress or exclude, advisory pretrial rulings must fall outside the limits of Section 1053(6). Therefore, this Court lacks appellate jurisdiction over the trial court’s pretrial advisory ruling.

As a result, I must concur in part and dissent in part.