

IN THE DISTRICT COURT OF CHOCTAW COUNTY
STATE OF OKLAHOMA

FILED
DISTRICT COURT
CHOCTAW COUNTY OKLAHOMA

STATE OF OKLAHOMA,
Plaintiff,

2008 FEB 5 PM 1 51

VS.

NO. CF-07-148 JIMMY L. WALKER, COURT CLERK

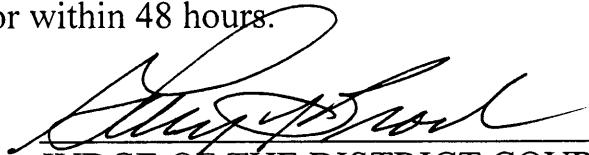
HARVEY DALE BOLDING,
Defendant.

BY _____
DEPUTY

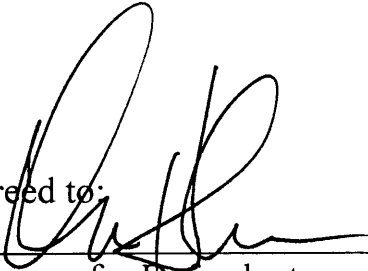
ORDER

Date: 2/5/08

The State confesses the defendant's Motion to Suppress/Dismiss and the case is hereby dismissed with \$500.00 court costs being assessed to the defendant. Defendant ordered to report to the cost administrator within 48 hours.



JUDGE OF THE DISTRICT COURT

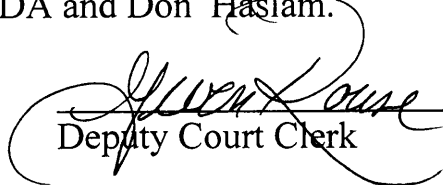
Agreed to:


Attorney for Defendant



Attorney for State

I hereby certify that on the 5 day of Feb, 2008, I mailed a true and correct copy of the above order to: DA and Don Haslam.



Deputy Court Clerk

**IN THE DISTRICT COURT OF CHOCTAW COUNTY,
STATE OF OKLAHOMA**

2008 FEB 5 AM 9 31
JAMIE L. MILNER, COURT CLERK
DEPUTY

STATE OF OKLAHOMA,)
)
Plaintiff,)
) Case No. CF-07-148
v.) Judge Jamie Wolfe
)
)
HARVEY DALE BOLDING,)
)
)
Defendant.)

MOTION TO DISMISS

COMES NOW the Defendant and moves the Court for its order dismissing this cause and shows the following in support.

Facts

The State has provided an insufficient chain of custody for the substance they allegedly seized that is the basis of the charges herein. The arresting officer, City of Hugo Police Department officer Jamie Milner testified at preliminary hearing that he stored the substance over the visor in his vehicle for some time, then kept the substance for several days in his shirt pocket at home, then took it to the Choctaw County jail for storage where he admittedly did not maintain a log showing what, how much or when it was stored. Milner testified he did not attempt to seal, secure or package the evidence in any way before he delivered the substance to the evidence room.

Law

Chain of custody must be established and the State must show the officer took reasonable precautions to preserve the original condition of the evidence. *Driskell v. State*, 659 P.2d 343 (OK CR 1983). It is the STATE’S BURDEN TO ESTABLISH A COMPLETE CHAIN in order to lay the foundation for admitting the evidence. *Ib.* The

purpose of the chain of custody rule is to ensure that physical evidence has not been tampered with or altered. *Moore v. State*, 761 P.2d 866 (OK CR 1988). The Defendant does not have to prove actual tampering or contamination, only an unreasonably high probability of contamination. *Faulkenberry v. State*, 1976 OK CR 131, others.

Application

Milner admits he kept the evidence herein in a worn shirt pocket for several days, at his home and elsewhere, before ever turning it in to a secure storage facility. He testified the evidence was not secured or packaged in any way during this time. Further, it became clear at the preliminary hearing that the policy of the evidence room in Choctaw County does not even involve an inventory of evidence when that evidence involves drugs. Every other kind of evidence – for some reason – is subject to an inventory.

As a result of this handling of the evidence, the State is unable to meet its burden to show a chain of custody [because of the absence of an inventory], and it is unable to show it took reasonable precautions to preserve the original condition of the evidence [because the evidence traveled for some time in an unpackaged way over the visor of Milner's truck [where he admittedly stored drugs before], and because he later stored the evidence unsealed, unpackaged in a dirty shirt pocket that he admitted had stored other drug evidence, and in his home and elsewhere *for days*. This conduct mirrors that by the officer in *Wilson v. State*, 1997 OK CR 251, where the Court of Criminal Appeals reversed a conviction and remanded with instructions to dismiss where the marijuana bought by an undercover drug buyer was kept in an unsealed bag hidden in his car or home before it was delivered to a DA investigator because it constituted a break in the

chain of custody. The Defendant herein is not required to show the evidence was actually tampered with or altered, only that Milner's handling of the evidence resulted in an unreasonable risk.

Conclusion

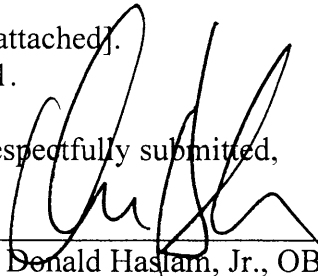
Officer Milner's handling of the evidence prevents the State from meeting its burden to establish a chain of custody.

WHEREFORE, Defendant respectfully urges the Court for its order suppressing the evidence herein, and dismissing this cause, and for such other relief as it finds just fair and equitable.

Table of Authorities

1. *Driskell v. State*, 659 P.2d 343 (OK CR 1983).
2. *Moore v. State*, 761 P.2d 866 (OK CR 1988).
3. *Collier v. State*, No. F-2004-1091 [unpub., see attached].
4. *Wilson v. State*, 568 P.2d 342, 1977 OK CR 251.

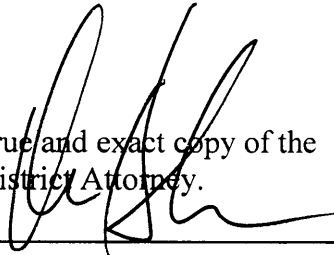
Respectfully submitted,


G. Donald Haslam, Jr., OBA #17873

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 05, 2008 a true and exact copy of the foregoing was delivered to the office of the Choctaw County District Attorney.


G. Donald Haslam, Jr.

FEB - 3 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA

MICHAEL S. RICHIE
CLERK

MORTARICE D. COLLIER,)
) NOT FOR PUBLICATION
 Appellant,)
 v.) Case No. F 2004-1091
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Mortarice D. Collier, was convicted of Trafficking in Illegal Drugs (Marijuana), in violation of 63 O.S.2001, § 2-415 (Count 1) and Failure to Affix Tax Stamp, in violation of 68 O.S.2001, § 450.8(B) (Count 2), in Craig County District Court, Case No. CF 2002-27. Mr. Collier waived jury trial and a bench trial was held on July 29, 2003, before the Honorable James Goodpaster, District Judge. Judgment and Sentence was imposed on September 18, 2003. Judge Goodpaster sentenced Collier to twelve (12) years imprisonment with a Twenty-Five Thousand Dollar (\$25,000.00) fine on Count 1 and to five (5) years imprisonment on Count 2. Judge Goodpaster suspended all but One Thousand Dollars (\$1,000.00) of the fine on Count 1 and ordered the sentences be served concurrently with credit for time served. The trial court on November 24, 2004 modified the sentence of imprisonment on Count

1 from twelve (12) years to five (5) years. Thereafter, Collier was granted an appeal out of time and filed this appeal.¹

Mr. Collier raises four (4) propositions of error:

1. The preliminary hearing evidence was insufficient to support binding over Appellant for trial;
2. Appellant was denied his constitutional right to a speedy trial;
3. Incarceration fees charged against Appellant should be vacated or modified; and,
4. Trooper Perry provided an insufficient chain of custody for the substance he seized that was the basis of the charges against Appellant.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find that Collier's convictions for both Trafficking in Illegal Drugs and Failure to Affix Tax Stamp should be reversed and remanded with instructions to dismiss for the reasons set forth below.

The record reflects the State did not provide adequate proof of the chain of custody of the marijuana recovered from Collier's vehicle. The State did not prove the location of the substance was secured for the ten days prior to its transportation to the OSBI laboratory for analysis and the packaging of the substance was not in the same form or condition as it was at the time the officer recovered the drugs from Collier's vehicle. While there is only speculation that tampering may have occurred, chain of custody was not

¹ Collier was originally granted an appeal out of time in Case No. PC 2004-384 on May 11, 2004. The appeal was still not timely filed, and Collier was granted a second appeal out of time on October 6, 2004 in PC 2004-880.

sufficiently established and the State did not show the law enforcement officer took reasonable precautions to preserve the original condition of the evidence. *Driskell v. State*, 1983 OK CR 22, ¶ 59, 659 P.2d 343, 354; *see also Faulkenberry v. State*, 1976 OK CR 131, ¶¶ 7-8, 551 P.2d 271, 273 (State did not establish how marijuana got to the OSBI and could not explain the ten day time gap in delivery; reversed and remanded for a new trial); *Conde-Hernandez v. State*, 1977 OK CR 204, ¶¶ 5-7, 565 P.2d 705, 707 (pills purchased by undercover narcotics officer and kept in her briefcase in an envelope for ten days prior to delivery to OSBI was insufficient chain of custody; reversed and remanded for a new trial); *Wilson v. State*, 1977 OK CR 251, ¶¶ 5-8, 568 P.2d 342 (marijuana purchased by undercover drug buyer and kept it in an unsealed bag hidden in his car or in his home before it was delivered to the DA investigator constituted a break in the chain of custody warranting reversal and dismissal). Here, the chain of custody was not sufficiently proven to sustain the foundation for the admissibility of this evidence. *Faulkenberry, id.* at ¶ 6. Accordingly, Collier's convictions for Counts 1 and 2 are hereby

REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

Our decision on Proposition Four renders the remaining propositions of error moot.

DECISION

The Judgment and Sentences imposed in Craig County District Court, Case No. CF 2002-27, are **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.**

AN APPEAL FROM THE DISTRICT COURT OF CRAIG COUNTY
THE HONORABLE JAMES GOODPASTER, DISTRICT JUDGE

APPEARANCES AT TRIAL

TIMOTHY WANTLAND
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CLAREMORE, OK
ATTORNEY FOR DEFENDANT

TERRELL CROSSON
ASST. DISTRICT ATTORNEY
CRAIG COUNTY COURTHOUSE
VINITA, OK
ATTORNEY FOR THE STATE

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OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS
LUMPKIN, V.P.J. :	DISSENTS
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

The facts and law relating to this case do not support the Court's decision to reverse and remand Appellant's convictions with instructions to dismiss. Therefore, I dissent.

The Court's Summary Opinion finds the State did not provide "adequate proof of the chain of custody of the marijuana recovered from Collier's vehicle." But in doing so, the Court plainly admits "there is only speculation that tampering may have occurred". I would not reverse these convictions, which were reached by a jury of twelve, based upon mere speculation that the drugs were tampered with while under police control.

I find this is purely a weight and credibility issue. The marijuana was at all times under police control. That someone might have had access to it goes to credibility, not admissibility. (Appellant did not object to its admissibility.) The Court, again, bends over backwards to reverse valid jury determinations.

Even assuming, *arguendo*, that the chain of custody problems required this court to throw out the subsequent test results, which I dispute, the relief of reversal and dismissal is not required. The officer's observations at the scene, the drug dog hit on the car, and the seizure of what was clearly marijuana are sufficient to sustain convictions for simple possession and failure to affix drug stamps. Appellant raised no error on appeal relating to an unconstitutional search and seizure. I suspect, however, that the relief granted today has more to do with that issue than the issue of chain of custody.