



**ORIGINAL**  
Case No. S-2023-921

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

MAY 10 2024

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA  
JOHN HADDEN  
CLERK

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THE STATE OF OKLAHOMA,

Appellant,

v.

ELMER VELASQUEZ,

Appellee.

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BRIEF IN RESPONSE TO APPELLANT'S STATE APPEAL

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FROM THE TULSA COUNTY DISTRICT COURT

CASE NO. CF-2023-2078

Before the Honorable Michelle Keely, District Judge

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May 10, 2024

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into evidence and is told to sit down. (P.H.Tr. 6:8-14). While Officer Oxford is testifying about the execution of the Search Warrant, Mr. Lutz attempted to interpose another oral motion to suppress the search based on the no knock entry described by Officer Oxford and was summarily over ruled by the Court. (P.H.Tr. 12:4-12). During cross-examination of Officer Oxford, Mr. Lutz submits the affidavit and search warrant which are admitted into evidence. (P.H.Tr. 25:2-15, 26:3-20, 27:1-21). It is established that the authority for the search warrant is limited to conventional daytime execution. (P.H.Tr. 27:22-24). Attempts by Mr. Lutz to distinguish the difference between this authority and a no knock warrant are extinguished by Special Magistrate Baldwin. (P.H.Tr. 32:7-19). When Officer Oxford testifies regarding identification attributed to the Appellee, Special Magistrate Baldwin refuses to hear an argument on how Officer Oxford can somehow convert a standard daytime service warrant into a no knock warrant. (P.H.Tr. 45:21-25, 46:1-11). For the third time, Mr. Lutz re-urges his motion to suppress the search based on the illegal execution of the search and is over ruled. (P.H.Tr. 55:16-25, 56:1-25, 57:1-25). Judge Baldwin over ruled Appellee's demurrer to the search and field test credibility and bound him over for District Court Arraignment. (P.H.Tr. 58:22-25, 59:11-17, 60:5-19).

On September 5, 2023, Appellee appeared in District Court before the Honorable Judge Michelle Keely and requested time to obtain a transcript of the preliminary hearing and file any appropriate motions. On October 9, 2023, Appellee filed a "Motion to Quash Bindover." (O.R. at 19-27). The State responded on the date of the motion hearing on October 24, 2023. (O.R. at 28-36). As a result, the motion hearing was continued to November 7, 2023, then November 8, 2023, in order to secure an interpreter, (O.R. at 3).

On November 8, 2023, the Honorable Judge Keely, District Judge, after hearing arguments from the Appellant and Appellee, sustained Appellee's motion after careful consideration of the

facts discerned from the preliminary hearing transcript, the affidavit and search warrant, and the law relevant to the matter from *Hudson v. Michigan*, 547 U.S. 586, 22 O.S.2001, § 1228, and *Brumfield v. State*, 2007 OK CR 10, 155 P.3d 826 , ¶12-15. (M.Tr. 21:17-25, 22: 1-25, 23:1-25, 4:1-6). The State announced its oral Notice of Intent to Appeal. (M.Tr. 24:10-11).

On November 9, 2023, the State filed Its written Notice of Intent to Appeal and Designation of Record in the District Court. (O.R. at 38-45). The State then filed its written Notice of Intent to Appeal and Designation of Record , as well as, its Petition in Error with the Clerk for the Oklahoma Court of Criminal Appeals on November 14, 2023, perfecting its appeal.

### **FACTUAL HISTORY**

At the beginning of the preliminary hearing, Mr. Lutz attempts to interpose an anticipatory oral motion to suppress the search of the premises in question which is denied by the Special Magistrate who will not consider an oral motion relying on documentation. (PH Tr. 4:8-29, 5:2-4). Mr. Lutz cites *Hyde v. Hutchison*, 1971 OK CR 162, 43 P.2d 766, in support of his oral motion. (PH Tr. 5:20-23). Defense Counsel attempts to offer the Affidavit for Search Warrant and the Search Warrant into evidence and is told to sit down. (PH Tr. 6:8-14).

The State calls Officer Justin Oxford to the stand. Testifying as to the evidence collected for the search warrant affidavit, Officer Oxford does not testify if it was a controlled buy, what actual surveillance was performed, or how the Defendant was identified. (PH Tr. 8:13-25).

Officer Oxford testified on direct examination that as the team executed the search warrant, many announcements were made, including in Spanish, while they approached the door. (PH Tr. 11:12). It was only after making these announcements that Oxford noticed a camera above the

facts discerned from the preliminary hearing transcript, the affidavit and search warrant, and the law relevant to the matter from *Hudson v. Michigan*, 547 U.S. 586, 22 O.S.2001, § 1228, and *Brumfield v. State*, 2007 OK CR 10, 155 P.3d 826 , ¶12-15. (M.Tr. 21:17-25, 22: 1-25, 23:1-25, 4:1-6). The State announced its oral Notice of Intent to Appeal. (M.Tr. 24:10-11).

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Officer Oxford testified on direct examination that as the team executed the search warrant, many announcements were made, including in Spanish, while they approached the door. (PH Tr. 11:12). It was only after making these announcements that Oxford noticed a camera above the

door which “compromised” their warrant. (PH Tr. 11:13-16). They knocked and announced and then entered the home. (PH Tr. 11:25, 12:1,2).

At this point in the hearing, Mr. Lutz attempted to interpose another oral motion to suppress the search based on the no knock entry and was summarily overruled by the Court. (PH Tr. 12:4-12).

After breaching the door and entering the residence, Oxford and his team discovered three adults present- one male on a mattress in the living room and a male and female coming from the area of the back bedroom. (PH Tr. 12:16-23).

In the middle bedroom, passports and IDs belonging to the Defendant were recovered. (PH Tr. 13:22-25, 14:8-25).

Officer Oxford testifies to recovering scales and a white powdery substance which is later field tested. Over Mr. Lutz’s objection and in spite of Officer Oxford answering the direct question from the Court that he did not perform the field test, Oxford is allowed to continue to testify regarding the test. (PH Tr. 15: 3-24).

The State wants to introduce evidence about the field test results. Mr. Lutz objects and attempts to explain the condition precedent necessary to reach the conclusion about to be testified to. (PH Tr. 20:1-25, 21:1-6).

Oxford testifies to observing the field test with a presumptive positive result for cocaine. (PH Tr. 21:10-17). Mr. Lutz objects again and is overruled. (PH Tr. 21:18-21).

Mr. Velasquez’s Miranda Rights are read to him in Spanish by another officer - a language Officer Oxford does not speak. (PH Tr. 22:7-25, 23:1-8).

During cross-examination of Officer Oxford by Mr. Lutz, it is established that the actual search warrant is for a place and that search warrant, along with the affidavit, are admitted into evidence. (PH Tr. 25:2-25, 26:3-20, 27:1-12, 27:14-21).

It is established that the authority for the search warrant is a conventional daytime search. (PH Tr. 27:22-24). Attempts to distinguish the difference between this warrant and a no-knock warrant are extinguished by the Court. (PH Tr. 32:7-19).

On cross-examination, Officer Oxford cannot recall what the surveillance camera actually looks like, or if he saw it, during initial surveillance prior to his application for a warrant. (PH Tr. 32:20-25, 33:1-13). Officer Oxford finally admits he may have known about the camera prior to his affidavit for a search warrant and did not list it as an exigent circumstance for his affidavit. (PH Tr. 33:14-25, 34:1-17).

Contradicting his testimony on direct, Oxford admits to walking up to the door, yelling they are compromised, and immediately breaching the door. (PH Tr. 35:22-25, 36:1,2). He admits the occupants were not given an opportunity to open the door. (PH Tr. 36:13-23).

Regarding the sample discovered in the middle bedroom, Officer Oxford cannot recall who initially located it. (PH Tr. 37:8-25, 38:1-6). He knows Officer Criner took custody of the substance, but he is not sure if she performed the field test. (PH Tr. 38:7-13). Officer Oxford cannot tell the Court who actually performed the field test or whether they agitated the sample for the requisite time. (PH Tr. 41:25, 42:1, 43:2-6).

With respect to the identification attributed to Mr. Velasquez, Officer Oxford cannot testify as to who placed them in the middle bedroom or when they were placed there. (PH Tr. 44:22-25, 45:1-6).



It is at this point in the proceedings that the Special Magistrate again refuses how Officer Oxford can somehow convert a standard daytime service warrant into a no-knock warrant. (PH Tr. 45:21-25, 46:1-11).

Officer Oxford admits that his default conclusion when he sees cash at a residence where a search warrant is executed is that it must be drug proceeds in spite of testifying to personal knowledge that one of the occupants of the house was actually going to work that day. (PH Tr. 51:9-25). He testifies to this while also acknowledging that it is common for Hispanic people to deal in cash. (PH Tr. 51:24,25, 52:1-5). The Court asks and Officer Oxford admits he has no idea how much anyone in the house made. (PH Tr. 53:9,10). Furthermore, Officer Oxford testifies he has no idea where the residents of the home placed their money for safekeeping. (PH Tr. 53:13-16).

For the third time, Mr. Lutz re-urges his motion to suppress the search based on the execution and is overruled. (PH Tr. 55:16-25, 56:1-25, 57:1-25).

Defense Counsel also argues the testimony regarding how the field test was performed lacked the necessary credibility to warrant binding the matter over — He is overruled. (PH Tr. 58:22-25, 59:1-17, 60:9-16).

## **AUTHORITY AND ARGUMENT**

### **I.**

#### **Standard of Review**

In appeals brought pursuant to 22 O.S. § 1053, the Court reviews the trial court's decision to determine if the trial court abused its discretion. *State v. Gilchrist*, 2017 OK CR 25, ¶ 12, 418 P.3d 182, 185 (citing *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950). An abuse of

discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225. An abuse of discretion has also been described as “a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented.” *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263 (internal citation omitted); *see also Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

## II.

### **Response to the Alleged Proposition of Error**

**Proposition One:**            **The District Court did not abuse its discretion when it applied the Exclusionary Rule of Title 22 O.S. § 1228 after consideration of *Brumfield v. State*.**

The District Court did exactly as this Court directed when she excluded the evidence illegally obtained by Officer Oxford when he ignored the safety of himself and his fellow officers, as well as the occupants of a family home, by his *sua sponte* decision to convert a conventional warrant into a “no-knock” warrant without giving the occupants a chance to answer the door before he breached it. The Trial Court obviously considered the facts presented in the preliminary hearing—including the about face testimony of Officer Oxford once it was brought to his attention a uniformed officer might be wearing an active body camera as they executed the search warrant. (M.Tr. 21:18-25, 22:1,2).

The Trial Court considered the law in the federal case *Hudson v. Michigan*. In fact, the record clearly reflects the Trial Court read *Banks*, the case quoted and expounded on in *Hudson*. (M. Tr. 22:3-10). The Trial Court was persuaded by *Hudson v. Michigan*. Then, the Trial Court reviewed 22 O.S. § 1228 (A) (1) and this Court’s decision in *Brumfield v. State*, 2007 OK CR 10,

155 P.3d 826. What the Appellant refers to as *dicta* in *Brumfield* is actually seven (7) paragraphs devoted to an analysis of *Hudson v. Michigan* and 22 O.S. § 1228. The Appellant ignores the fact that the Trial Court overruled Defense Counsel's suppression arguments in *Brumfield* and that the entire matter might have been reversed and dismissed had Trial Counsel preserved the suppression issue at Jury Trial. *Brumfield* at ¶ 16, *Brumfield* at 833-834. The Appellant wants this Court to believe that an issue that was the crux of the initial proposition of error in *Brumfield* where the State filed a supplemental brief regarding *Hudson* which the Court ordered to be filed and allowed *Brumfield* to file a response brief before deciding the matter was mere *dicta*.

**Proposition Two: Is there an alternative reason for appealing this case?**

Another truth is that if this Court reverses *Brumfield*, it will open the door for the Offices of the District Attorney to unjustly enrich themselves from civil forfeitures resulting from unlawful executions of search warrants or search warrants that cannot withstand a *Franks v. Delaware* hearing. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L.Ed.2d 667 (1978). This is the elephant in the room the Appellant would like this Court to ignore. The Appellant wants to use this Court to reduce its losses in forfeiture actions filed in civil court when defendants cite *Turner v. City of Lawton*, 1986 OK 51, 733 P.2d 375.

In *Turner*, a case where a firefighter was unlawfully terminated based on a facially defective affidavit, the exclusionary rule was applied. The Supreme Court referred to a forfeiture case in its decision citing *Hess v. State*, 84 Okla. 73, 202 P. 310, 314-16 (1921) as follows:

We find the logic of *Hess v. State*, 84 Okla. 73, 202 P. 310, 314-16 (1921) more carefully tailored than any available federal decisional law to deter the official misconduct which victimized Turner, and thus to be controlling precedent in this case. Although *Hess* was a forfeiture case and belongs in the quasi-criminal area, many jurisdictions considering this question have forbidden the introduction of the fruits of illegal searches in a host of derivative civil actions including

replevin, recovery on a fire insurance policy, defamation, wrongful death, termination of tenancy; and discharge proceedings of a civilian air force employee for unlawful possession of fire arms and for furnishing misleading educational qualifications.

*Turner v. City of Lawton*, 1986 OK 51, ¶ 14, 733 P.2d 375, 379-80

The Supreme Court of Oklahoma in *Turner* further expounded on the impact of unlawful searches in civil forfeiture actions:

Article 2, § 30 must be strictly construed, and unless it can clearly be shown that the officers making the search complied with the legal prerequisites necessary to constitute a lawful search, the evidence seized by an unreasonable search must be suppressed. The absolute security granted by the Okla. Const. Art. 2, § 30 against unlawful search or seizure exists without reference to the guilt or innocence of the person whose property is searched, and without consideration of whether the proceeding is civil or criminal in nature.

*Turner v. City of Lawton*, 1986 OK 51, ¶ 16, 733 P.2d 375, 380-81

The logical conclusion is that if this Court allows unlawful searches like the one in this case to suddenly become lawful, the District Attorneys' Offices will reap the rewards of the forfeitures they file. While this may be popular among the District Attorneys' Offices and law enforcement, it would be inconsistent with the protections the Oklahoma Legislature and this Court has afforded its citizens throughout this state's history. As we are reminded in *Hess*, the unanimous Court said:

The function of the courts of this country is to enforce a government of laws, and not a government of men. The final arbiter in all cases presented to appellate courts is the substantive law as controlled, limited, and regulated by the written law. (Meaning by the written law, the federal and state Constitutions and the statute law enacted in accordance with the Constitutions.) When an appellate court abandons the law as thus defined, it puts its ear to the ground to determine what is popular and what will or will not please the popular will. Such a court is then treading near a precipice that may engulf this government in anarchy. Such a court has broken with the law and the accepted wisdom of the ages, and is accepting in lieu thereof the rule of the popular will, and this is only a euphompus name for mob law, and means nothing else but mob law in its final analysis. Between these two positions

there can be no halting of the ways if we are to save our government from confusion and ultimate anarchy.

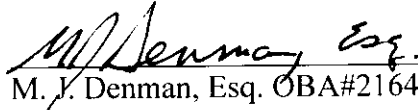
*Hess v. State*, 1921 OK 411, ¶ 29, 202 P. 310, 315-16

### III.

#### Conclusion

Upon reading the transcript of the Motion Hearing before the District Court, it is evident the District Court reviewed the preliminary hearing carefully and made findings of fact which were consistent to the hearing. The District Court not only reviewed the law and cases cited by the Appellant and the Appellee but performed independent research before reaching Its decision. Taking these facts into consideration, Appellee would request this Court to affirm the order of the District Court.

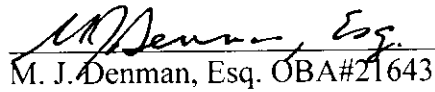
Respectfully Submitted,



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**CERTIFICATE OF DELIVERY**

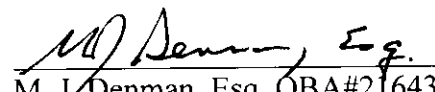
This is to certify that a true and correct copy of the foregoing Brief was hand delivered to John D. Hadden, Clerk of the Oklahoma Court of Criminal Appeals, State Capital Bldg., 2300 N. Lincoln, Room B-2, Oklahoma City, OK 73105 with sufficient postage thereon fully paid on the 10<sup>th</sup> day of May 2024.



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**CERTIFICATE OF DELIVERY**

This is to certify that a true and correct copy of the foregoing Brief was hand delivered/faxed/mailed with appropriate U.S. Postage prepaid to the Tulsa County District Attorney for the State of Oklahoma on the 10<sup>th</sup> day of May 2024.



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