



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

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

FEB - 1 2007

JOHN WHETSEL, OKLAHOMA COUNTY)
SHERIFF, and JUSTIN JONES, DIRECTOR)
OKLAHOMA DEPARTMENT OF)
CORRECTIONS,)

**MICHAEL S. RICHIE
CLERK**

Petitioners,)

v.)

No. PR-2006-1115

THE STATE OF OKLAHOMA, THE)
DISTRICT COURT OF OKLAHOMA)
COUNTY, THE HONORABLE RAY C.)
ELLIOTT, DISTRICT JUDGE, and ROBERT)
RAVITZ, PUBLIC DEFENDER, OKLAHOMA)
COUNTY, ON BEHALF OF KEVIN)
MERRITT, AND ALL SIMILARLY)
SITUATED INMATES INCARCERATED)
IN THE OKLAHOMA COUNTY DETENTION)
CENTER,)

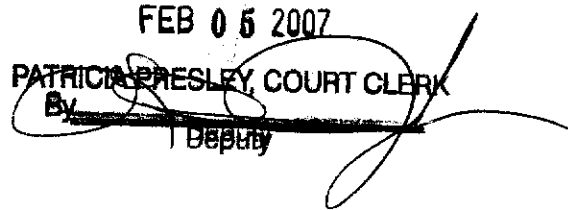
CV-06-11

**FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.**

FEB 05 2007

PATRICIA PRESLEY, COURT CLERK

Respondents.)

By  Deputy

**ORDER DENYING APPLICATION FOR WRIT OF PROHIBITION
AND LIFTING STAY**

On October 19, 2006, Petitioners John Whetsel, Oklahoma County Sheriff and Justin Jones, Director of the Oklahoma Department of Corrections (D.O.C.) by and through their respective counsel, filed a Joint Application for Stay Pending Application to Assume Original Jurisdiction and Application for Writ of Prohibition in Case No. CIV-2006-11 from the District Court of Oklahoma County. On October 20, 2006, Petitioner Whetsel, by and through counsel, C. Wesley Lane II, Oklahoma County District Attorney, and John M. Jacobsen, First Assistant District Attorney, filed a brief in support of the Application to Assume

Original Jurisdiction and Application for Writ of Prohibition. Petitioner requested this Court issue an order prohibiting Respondent, the Honorable Ray C. Elliott, Presiding Judge, Oklahoma County, from enforcing his order of September 29, 2006, wherein Judge Elliott ordered Petitioner Whetsel, in pertinent part, to

“notify and provide DOC [Department of Corrections] with the Judgment and Sentences for all sentenced inmates currently awaiting transfer to the Department of Corrections, and within 30 days of the date of this order, the Sheriff shall transport any such inmate who has no further proceedings pending in Oklahoma County to the Lexington Assessment and Reception Center in Lexington, Oklahoma. . . .

IT IS FURTHER ORDERED that all future OCDC [Oklahoma County Detention Center] inmates sentenced to serve a term of imprisonment in the state prison system and having no pending proceedings in Oklahoma County shall be transported and transferred to the custody of the Department of Corrections no later than 45 days after completion of the Judgment and Sentence(s) in the District Court.”

Whetsel alleged that Judge Elliott failed to comply with 57 O.S.2001, §§ 37 and 42 upon issuing this order.

On October 20, 2006, this Court entered an order refusing to summarily grant Petitioners’ application, and directing Respondents or their designated representatives to respond to the application and brief and show cause why the requested relief should not be granted. Proceedings in the matter were stayed pending further order of this Court.

On November 3, 2006, Respondents Elliott and Ravitz filed a joint response to Petitioners’ Application for Writ of Prohibition. Respondents request this Court deny Petitioners’ Application for Writ of Prohibition, dissolve the stay

issued on October 20, 2006, and direct that all validly sentenced inmates be transferred to the custody of D.O.C. in compliance with Judge Elliott's order. We now address Petitioners' Application.

On August 3, 2006, Petitioner Ravitz, Oklahoma County Public Defender, on behalf of Kevin Merritt, and "all similarly situated inmates incarcerated in the Oklahoma County Detention Center" filed a "Notification to the District Court and Petition for Declaratory and Injunctive Relief to Correct Overcrowding in the Oklahoma County Detention Center" in the District Court of Oklahoma County, assigned Case No. CIV-2006-11. Ravitz reported to the District Court that Respondent Merritt, and approximately 800 other similarly situated prisoners, were being held in the Oklahoma County Jail, in violation of State law, for periods of weeks, and sometimes months, after valid judgments and sentences had been issued ordering them to D.O.C. custody. Ravitz alleged the failure to timely transport the inmates is a violation of 57 O.S. §§ 95 and 521(A). Additional allegations contained in the Notification claimed that the jail was overcrowded, that inmates were being triple celled, and that inmates were being denied their due process rights to "statutory benefits of D.O.C. custody not available to them while incarcerated in the county jail."¹ Ravitz argued that these due process rights are "cognizable in mandamus". Finally, Ravitz claimed that while D.O.C. is permitted, by statute, to pay a *per diem* subsidy to county

¹ As an example of due process violations, Ravitz cited to 57 O.S. § 138 which allows inmates to earn time credits based upon earned security levels. He also alleged that there are educational and recreational opportunities through D.O.C. not available in the county jail, which allow an

jails to hold inmates when D.O.C.'s facilities reach capacity, the provision cannot be constitutionally applied to jails that have exceeded their own inmate capacity. In conclusion, Ravitz argued that permitting D.O.C. to violate its statutory responsibility to prisoners "creates a financial incentive to violate inmate Due Process rights to the statutory benefits of D.O.C. custody, but also denies to jail detainees the humane jail conditions to which they are constitutionally entitled."

On August 23 and 24, 2006, the District Court of Oklahoma County, the Honorable Ray C. Elliott, in his capacity as Presiding Judge, conducted an evidentiary hearing regarding Ravitz's Notification and Writ. The following findings (relevant to this Court's disposition of Petitioners' application) are taken from Judge Elliott's September 29, 2006 order:

1. The Oklahoma County Detention Center (O.C.D.C.) has a maximum capacity of 2,890 inmates. Judge Elliott specifically found "[A]t no time has the population of the OCDC exceeded 2,890 inmates, indicating the OCDC has never been overcrowded."
2. Pursuant to Oklahoma Health Department standards, triple celling can only occur when the cell has at least 80 square feet of space. While the jail may not be overcrowded, if inmates are triple celled in cells smaller than 80 square feet then those particular cells are considered overcrowded in violation of Health Department rules and regulations.

inmate to earn good-time credits.

3. D.O.C. inmates awaiting acceptance to Lexington Assessment and Reception Center (L.A.R.C.) have been triple celled in the O.C.D.C. in cells containing less than 80 square feet, and are therefore being held irregularly.
4. D.O.C. currently permits only 38 inmates to be transported to L.A.R.C. each week, due to the large number of prisoners regularly sentenced and currently incarcerated in the State prison system. Judge Elliott found “[F]ailure to remove these state inmates from O.C.D.C. requires the jail to continually house many inmates three to a cell in cells originally designed for only one inmate.”
5. D.O.C. inmates housed in the O.C.D.C. are prohibited by D.O.C. contract from being triple celled. Judge Elliott found D.O.C. inmates awaiting transfer to L.A.R.C. from O.C.D.C. are being denied “statutorily mandated opportunities to earn time credits to reduce their state prison sentences at the same rate as similarly situated inmates who have been processed through L.A.R.C. and assigned to a particular facility.”
6. Inmates awaiting transfer to L.A.R.C. and subsequent D.O.C. custody are being subjected to irregular treatment and are being held in a state of ongoing “irregularity”.

As a result of these findings, Judge Elliott ordered Sheriff Whetsel to immediately notify and provide D.O.C. with the judgments and sentences for all sentenced

inmates currently awaiting transfer to D.O.C., and within 30 days of the order to transport any inmate who has no further pending Oklahoma County proceedings to L.A.R.C. Sheriff Whetsel was further ordered to continually transfer such inmates to D.O.C. custody no later than 45 days after "completion"² of the judgment and sentence(s) by the District Court.

In the joint application for extraordinary relief filed with this Court, Petitioner Whetsel alleges that because Judge Elliott determined that O.C.D.C. was not overcrowded, Whetsel was unable to legally notify D.O.C. that O.C.D.C. was housing inmates in excess of its inmate capacity. Whetsel further argues that because Judge Elliott found O.C.D.C. was not overcrowded, Judge Elliott has no statutory authority to compel Whetsel to notify D.O.C. to pick up or arrange for transportation of D.O.C. inmates to L.A.R.C. Whetsel asserts that his attempts to obey such an order would most likely be met with a directive from D.O.C. to the L.A.R.C. Warden not to accept those prisoners awaiting transfer.

Whetsel argues that a writ of prohibition is the only remedy available to him, and that Judge Elliott has attempted to exercise judicial power not authorized by law and in contravention of his judicial power to do so. Whetsel also argues that O.C.D.C. is properly used to house prisoners awaiting transfer to D.O.C. custody (assuming the jail is not overcrowded); that Judge Elliott's order violates the separation of powers in that the order is an attempt to

² This Court assumes, from the context of Judge Elliott's order, that the term "completion"

administer and supervise the internal affairs of D.O.C.; that the District Court did not have jurisdiction to hear Ravitz's complaint as O.C.D.C. was not overcrowded; and that Sheriff Whetsel has complied with all statutory requirements regarding the housing of D.O.C. inmates in O.C.D.C.

The joint response filed on behalf of Judge Elliott and Respondent Ravitz (on behalf of prisoner Merritt and those similarly situated), argues that Ravitz, as the Oklahoma County Public Defender, has standing to bring this action in the District Court; that the presiding judge of the District Court has jurisdiction over the parties and the subject matter; and that Judge Elliott's remedy was proper and authorized by law.

For a writ of prohibition, Petitioners must establish (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006). We find that Petitioners have not met this burden, and the request for a Writ of Prohibition is therefore **DENIED**.

This Court has jurisdiction of these proceedings. *See, State ex rel. Henry v. Mahler*, 1990 OK 3, ¶ 15-17, 786 P.2d 82, 86. Issues concerning the determination of the amount of punishment and questions regarding a

refers to the entry of a final judgment and sentence in a particular defendant's case.

prisoner's release from confinement are not administrative matters and are within this Court's exclusive jurisdiction.

The issue before this Court is neither the alleged overcrowded conditions at O.C.D.C. or the housing of prisoners either by O.C.D.C. or D.O.C. Rather, the question is whether a defendant is required to be transferred to D.O.C. custody subsequent to the entry of final judgment and sentence, and the conclusion of all other District Court proceedings relating to that defendant, within a reasonable amount of time. We find in the affirmative.

It is not disputed that prisoners have no liberty interest in the situs of their incarceration, and the State may confine them where it wishes.³ However, the Legislature has dictated that prisoners sentenced to imprisonment that is not to be served in the county jail *shall* be committed to D.O.C. for classification and assignment to a correctional facility or program designated by D.O.C. and authorized by law. 57 O.S. § 521(A).⁴ The mandatory language creates a statutory duty, whereby D.O.C. is to facilitate the transfer and transport of prisoners to its custody upon entry of a proper

³ As noted by the United States Supreme Court in *Olim v. Wakinekona*, 461 U.S. 238, 241-245, 103 S.Ct. 1741, 75 L.Ed.2d 813, 820 (1983)

"[T]he initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons."

⁴ 57 O.S. § 521(A). "Whenever a person is convicted of a felony and is sentenced to imprisonment that is not to be served in a county jail, the person *shall* be committed to the custody of the Department of Corrections and *shall* be classified and assigned to a correctional facility or program designated by the Department and authorized by law." (emphasis added).

judgment and sentence. Sheriff Whetsel's corresponding duty to transfer and transport prisoners to D.O.C. custody is found at 57 O.S. 2006 Supp. § 95 (A) and 22 O.S. §§ 979 and 980.⁵ Tit. 22 O.S. § 980 comes closest to establishing a time limitation on the transfer, providing that the sheriff has a duty, **upon receipt of a certified copy of the judgment for imprisonment**, to "take and deliver the defendant to the warden" of L.A.R.C. or some other specified location. The transfer and transport of the duly convicted prisoners is mandatory, not discretionary.

As noted by Petitioners, the relevant statutes governing the removal of prisoners to State correctional facilities contain no specific language regarding the timing of prisoner transfers generally.⁶ However, to suggest that the

⁵ 57 O.S. 2006 Supp. §95(A) states:

A. Any person convicted of an offense against the laws of this state and sentenced to imprisonment that is not to be served in a county jail **shall be transported by the sheriff** of the county where the person is sentenced, or transported by a designated representative of the sheriff, to the Department of Corrections at the Lexington Assessment and Reception center or other location designated by the Director of the Department of Corrections.

22 O.S. § 979 reads:

When the judgment is imprisonment in a county jail, or a fine, and that the defendant be imprisoned until it be paid, the judgment must be executed by the sheriff of the county or subdivision. In all other cases when the sentence is imprisonment, the sheriff of the county must deliver the defendant to the proper officer, in execution of the judgment.

⁶ In the event a county jail is found to be overcrowded, the Legislature has determined that transfer of prisoners is to be scheduled within 72 hours. See, 57 O.S. 2004 Supp. § 37(C)57 O.S. 2004 Supp. § 537(C) states:

C. When a county jail has reached its capacity of inmates as defined in Section 192 of Title 74 of the Oklahoma Statutes, then the county sheriff shall notify the Director of the Oklahoma Department of Corrections, or the Director's designated representative, by facsimile, electronic mail, or actual delivery, that the county jail has reached or exceeded its capacity to hold inmates. The notification shall include copies of any judgment and sentences not previously delivered as required by subsection B of this section. Then within seventy-two

absence of a specific time limitation allows for the indefinite postponement or non-completion of an inmate's transfer to D.O.C. is a misinterpretation of the statutes in question. Since there is no specific deadline articulated in the relevant statutes, we apply, as we have in past cases, a standard of reasonableness. See, *Hunter v. State*, 1992 OK CR 19, ¶ 5, 829 P.2d 64, 65 (When there is no set time prior to trial within which the State must file a Bill of Particulars, the filing must be done within a reasonable time period prior to trial); *Stuart v. State*, 1974 OK CR 92, ¶ 31, 522 P.2d 288 and *Morse v. State*, 77 P.2d 757, 760 (When there was no statute fixing the time for trial to be held after arraignment and a plea of not guilty, a reasonable time must be allowed; reasonable time depends upon the circumstances of a particular case). We find that the statutes mandating transfer of convicted defendants from a county jail to D.O.C. custody require the transfer of such persons to be accomplished within a reasonable amount of time.

We recognize that management and running of prisons is a function of the executive branch of government and that the sole and exclusive power to operate the State's prisons has been delegated to D.O.C. Oklahoma Corrections Act, 57 O.S. §§ 501, *et seq*; *Fields v. Dreisel*, 1997 OK CR 33, ¶¶ 21-

(72) hours following such notification, the county sheriff shall transport the designated excess inmate or inmates to a penal facility designated by the Department. The sheriff shall notify the Department of the transport of the inmate prior to the reception of the inmate. The Department shall schedule the reception date and receive the inmate within seventy-two (72) hours of notification that the county jail is at capacity, unless other arrangements can be made with the sheriff.

22, 941 P.2d 1000, 1005. Until prisoners are transported and transferred to D.O.C. custody, however, they remain in the custody and control of the county sheriff, and therefore under the jurisdiction of the District Court that sentenced them. As the convicted prisoners in this case currently reside at the O.C.D.C., and have not yet been conveyed into D.O.C. custody, they remain in the custody and control of the Oklahoma County Sheriff. *Fields v. Dreisel*, 1997 OK CR 33, ¶ 12, 941 P.2d 1000, 1004. As such, a directive from the District Court ordering the Sheriff to perform his statutory duty cannot be considered an unauthorized use of judicial power. Nor does Judge Elliott's order constitute a violation of the separation of powers doctrine since the persons in question are not yet in D.O.C. custody.

The only remaining question is whether the time limitation imposed in Judge Elliott's September 29, 2006 order meets the definition of "reasonable". We find that it does. A review of the record in this matter reveals that Ravitz's Notification application was properly filed; it was set for hearing by the Presiding Judge of the county in which the O.C.D.C. is located; a hearing was conducted, and evidence was presented for Judge Elliott's consideration; the evidence was evaluated and the conclusion reached that absent a conflicting statutory directive, prisoners must be transported and transferred to D.O.C. custody within a reasonable time following entry of a final judgment and sentence. There is no claim in Petitioners' application filed with this Court that the initial 30-day directive, and subsequent 45-day directive, issued by

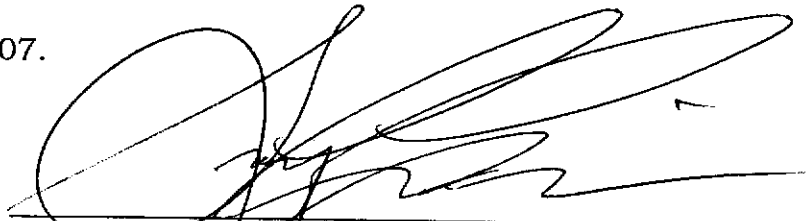
Judge Elliott constitute unreasonable time requirements for the transfer and transport of convicted prisoners from O.C.D.C. custody to D.O.C. custody. Absent some showing that this time limitation is unreasonable, we cannot find that Petitioners have suffered harm, or that execution of Judge Elliott's order should be prohibited.

IT IS THEREFORE THE ORDER OF THIS COURT that Petitioners' Application for Writ of Prohibition is **DENIED**. The Stay of Proceedings in this matter is hereby **LIFTED**.

Issuance of this order concludes proceedings before this Court. The Clerk of this Court is directed to transmit a copy of this order to the Supreme Court of Oklahoma, Respondent, the Honorable Ray C. Elliott, District Judge, the Court Clerk of Oklahoma County, Petitioners, Respondent Ravitz and counsel of record.

IT IS SO ORDERED.

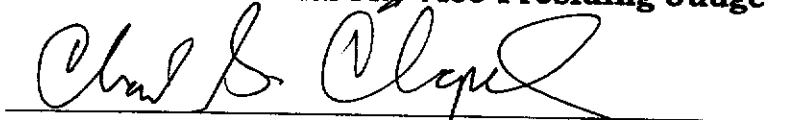
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 1st day of February, 2007.



GARY L. LUMPKIN, Presiding Judge



CHARLES A. JOHNSON, Vice Presiding Judge



CHARLES S. CHAPEL, Judge

Arlene Johnson
ARLENE JOHNSON, Judge

David B. Lewis
DAVID B. LEWIS, Judge

ATTEST:

Michael S. Rich
Clerk

OA/F