

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARVIN KEITH STITT,)
)
 Appellant,)
)
 v.)
)
 THE CITY OF TULSA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 15 2024

Case Number: M-2022-984 JOHN D. HADDEN
CLERK

City of Tulsa Municipal Court
Case Number 7569655

APPELLEE CITY OF TULSA’S MOTION TO STRIKE THE
“NOTICE OF SUPPLEMENTAL AUTHORITY” AND RESPONSE TO THE
“UNITED STATES’ MOTION TO PARTICIPATE AS AMICUS CURIAE”

COMES NOW, the City of Tulsa (“the City”), by and through its attorneys, and presents to this Honorable Court a Motion to Strike the “Notice of Supplemental Authority” filed on February 5, 2024, and a Response to the “United States’ Motion to Participate as Amicus Curiae” filed on February 7, 2024. Neither the Chickasaw, Choctaw and Cherokee Nations nor the United States consulted the City before filing their documents, and as such, the City files this document to notify the Court of the City’s objection to both. The City respectfully objects to further briefing and/or remand.

RELEVANT PROCEDURAL FACTS

The date of the lower court’s order appealed in this case was October 20, 2022. Appellant filed his Notice of Intent to Appeal on November 7, 2022. Appellant’s Petition in Error was filed on January 17, 2023, and he filed his initial brief on April 13, 2023. The various tribal amici filed motions to

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participate as amici in April 2023 and filed their initial briefs in May 2023. Appellee City of Tulsa filed its brief on June 12, 2023. The Tenth Circuit Court of Appeals rendered its decision relating to the City's Curtis Act jurisdiction on June 28, 2023. *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023). The Appellant filed his reply brief and various tribal amici filed reply briefs on or about July 3, 2023, after the Tenth Circuit rendered its *Hooper* decision.

In their initial Amicus Brief filed in May 2023, the Muscogee (Creek) Nation and Seminole Nation spent ten pages arguing about *Castro-Huerta v. Oklahoma*, 597 U.S. 629, 142 S. Ct. 2486 (2022) and the *Bracker* analysis. Br. of Muscogee (Creek) Nation and Seminole Nation at 20-30, (May 31, 2023).

Because the City had no opportunity to file a brief after the *Hooper* Decision was rendered, the City filed on August 18, 2023, a motion for leave to file a supplemental brief to address the Tenth Circuit decision. On September 19, 2023, this Court ordered the parties to brief the effects of both the Tenth Circuit Court of Appeals' decision in *Hooper v. City of Tulsa* and the United States' Supreme Court's decision in *Castro-Huerta v. Oklahoma*, 597 U.S. 629, 142 S. Ct. 2486 (2022). That same order invited the various amici to brief *Castro-Huerta* as well, and all party and amici briefs were ordered to be filed on the same date. All five tribal amici filed supplemental briefs in response to this Court's order and briefed *Castro-Huerta* on October 19, 2023.

The Oklahoma Association of Municipal Attorneys (OAMA) filed a motion for leave to file a brief on October 19, 2023, and there was no objection. This

Court, on December 20, 2023, issued an order permitting the OAMA to file an amicus brief, which was filed January 18, 2024.

On February 5, 2024, the “Notice of Supplemental Authority” was filed by the amici Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma (“the Three Nations”). The United States Attorney’s Office (“USAO”) filed on behalf of the United States of America a “Motion to Participate as an Amicus Curiae, on February 7, 2024.

I. MOTION TO STRIKE “NOTICE OF SUPPLEMENTAL AUTHORITY”

The City moves to strike the “Notice of Supplemental Authority” filed by the Three Nations (“the Notice”) because it is procedurally defective. Per Rule 3.4(F)(2), Supplemental Briefs are only permitted when “necessary to present new authority on issues previously raised” and may only be “filed if granted leave of Court.” *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 Ch. 18, App. (2011), Rule 3.4(F)(2). The Notice was filed without a motion requesting, and an order permitting, its filing. It should therefore be stricken by the Court.

Further, there is no new law raised in the first bullet point of the Notice. Notice of Supp. Auth. at 1-4 (Feb. 5, 2024). The collateral estoppel argument was available to the Three Nations at the time they filed their Supplemental Brief. It appears to be an argument these amici simply neglected to raise in their Supplemental Brief.

As for the argument in the second bullet point, that this Court’s jurisprudence requires a remand for the trial court to conduct a “particularized

inquiry into the state, federal and tribal interests,” Notice of Supp. Auth. at 1, 4-5 (Feb. 5, 2024), the cited case may be new, but it is not on point. *State ex rel. Ballard v. Crosson*, 2023 OK CR 18, 540 P.3d 16. The *Crosson* case involved a crime where the magistrate refused to issue an arrest warrant for an Indian charged in State Court with manufacturing, distributing, and possessing child pornography in Indian Country. *Id.* at ¶ 2. The State there sought a writ of mandamus to require the magistrate to issue an arrest warrant, because the magistrate found probable cause existed but had refused to issue the warrant, finding the State Court did not have jurisdiction over the crime since the defendant was an Indian committing a felony on Indian Country. *Id.* at ¶¶ 2-4. This Court did not make a ruling on *Castro-Huerta’s* application to the case but ruled that those “arguments will undoubtedly play out in the trial court” and held that the arguments “should be resolved by our adversarial system, not the limited *ex parte* review of a magistrate in considering the issuance of an arrest warrant.” *Id.* at ¶ 7. Thus, *Crosson* does not stand for the proposition that this Court requires a trial court to hold an evidentiary hearing specific to the *Castro-Huerta* and *Bracker* preemption analyses in every case where the City’s and/or State’s jurisdiction over Indians is raised.

In the proceedings in this case in the court below, there were multiple hearings on motions to dismiss as well as a non-jury trial on the matter. Although the Three Nations argue there is no factual record “on any tribal, state, and federal interests” and that the City proved nothing more than the

“Appellant’s driving speed” in the trial court, Notice of Supp. Auth. at 4, they fail to note the additional evidence in the record. The City proved that the State of Oklahoma maintains the road where Appellant committed the aggravated speeding offense and that the Oklahoma Department of Transportation established the traffic control devices setting the speed in the location where the offense occurred. (O.R. at 523, Tr. at ll. 1-10). In addition to the affidavit and information cited in the City’s Supplemental Brief, the City also presented evidence in the trial court of the City’s operations and the effect of Indian Country jurisdictional questions on its police in an affidavit from the Chief of Police. (O.R. at 116-123). The crime at issue here occurred in the Muscogee (Creek) Nation, and that tribe filed with its original brief an Affidavit of Attorney General Geraldine Wisner presenting the tribe’s interests. Br. of Amici Curiae Muscogee (Creek) Nation and Seminole Nation of Okla. at Ex. A (May 31, 2023). As such, the tribal interests have been fully asserted.

The tribal amici had adequate opportunity to assert their interests in the multiple briefs filed by the various tribes throughout this case. If they failed to adequately assert their interests, it is not because they were not given an opportunity. Notably, although the Three Nations raise the *Crosson* case as new authority, they neglect to mention the newest case issued by this Court on tribal and State jurisdictional matters. *Deo v. Parish*, 2023 OK CR 20, 541 P.3d 833, 837 (holding that “*Bracker* balancing does not operate to preempt Oklahoma district courts’ subject matter jurisdiction”).

Regardless, the Three Nations failed to seek leave of Court to file their supplemental authority, and it should be stricken for this procedural defect.

II. OBJECTION TO UNITED STATES FILING AMICUS CURIAE BRIEF

The United States argues it should be permitted to file an amicus brief because it has a “substantial interest in the allocation of criminal jurisdiction in Indian Country” and because it “has a special relationship with the Indian Tribes,” but also that it did not know about this case and the briefing until late January 2024. United States Mot. to Participate as Amicus Curiae at 2-4 (Feb. 7, 2024). The failure of the tribes and the United States to communicate about State cases involving the tribes which relate to Indian Country jurisdiction is not a sufficient reason to extend the time for briefing on a case the United States should have known about.

It is no secret that the City has raised *Castro-Huerta* as an alternative to the Curtis Act to exercise jurisdiction over Indians in Indian Country. This course of action was suggested by two United States Supreme Court Justices and has been highly publicized. *City of Tulsa v. Hooper*, Mem. Op. at 1, 600 U.S. --- 2023, WL 4990789 (statement of J. Kavanaugh joined by J. Alito).¹

Indeed, almost three months ago after the *Hooper* decision issued, the Muscogee (Creek) Nation sued the City in federal court and cited the case at bar for the proposition that the City is exercising jurisdiction over Indians pursuant to *Castro-Huerta*. Compl. at 8-9, *Muscogee (Creek) Nation v. City of Tulsa*, Case

¹ See, e.g. <https://www.news9.com/story/64cd56ae0af342072ac20c58/supreme-court-denies-stay-in-case-of-city-of-tulsa-v-hooper>.

No. 4:23-cv-00490-SH (N.D. Okla. Nov. 15, 2023). Media coverage of that lawsuit occurred both in the City² and throughout the United States.³ That the USAO is unaware of a highly publicized Indian Country jurisdictional case filed in the same federal courthouse where it operates is not a valid reason to delay here.

Although the City would not have objected had the United States filed its motion and brief in a timely manner, this case is well past the eleventh hour, and the United States' request will further delay a decision on cases in which it has little to no interest. Although the United States is supposed to maintain exclusive jurisdiction over crimes committed by Indians when such crimes are enumerated in the Major Crimes Act, federal law enforcement agencies are not the primary investigators of such crimes within the City of Tulsa; Tulsa Police Department conducts the investigations and provides the prosecution packets to the USAO, and then the federal law enforcement officers sometimes conduct follow-up investigation such as obtaining search warrants for cellular phones and so on. Importantly, although many Tulsa Police Officers have federal commissions with the Bureau of Indian Affairs, Federal Bureau of Investigation, and other agencies, the City has agreed to investigate these crimes which are the responsibility of the federal government through a written agreement and may withdraw from that agreement at any time upon giving 30 days' notice just as

² <https://www.kjrh.com/news/local-news/muscogee-creek-nation-sues-tulsa-over-prosecution-of-native-citizens>, https://tulsaworld.com/news/local/crime-courts/muscogee-nation-challenges-city-of-tulsas-criminal-jurisdiction-over-its-tribal-citizens/article_8cacf1e6-83f2-11ee-97da-5f331502f8a8.html.

³ <https://apnews.com/article/muscogee-creek-nation-lawsuit-tickets-mcgirt-16cf26784d4b755a1805da7ee27f983e>.

the City can withdraw from the Bureau of Indian Affairs and MCN cross-deputization agreement with 60 days' notice and Cherokee Nation cross-deputization agreement with 30 days' notice⁴. The USAO does not even prosecute all the Major Crimes cases presented by Tulsa Police and continues to decline a significant number of cases for prosecution including almost all burglaries. As such, the USAO is certainly not going to prosecute the misdemeanors and traffic citations filed in the Municipal Court.

Notwithstanding its trust relationship with the tribes, the United States did not get involved, as amicus or otherwise, in *Hooper v. City of Tulsa* as that case made its way through the federal system. Importantly, the tribes initially raised *Castro-Huerta* jurisdiction to this Court more than eight months ago, in May 2023, Br. of Muscogee (Creek) Nation and Seminole Nation of Okla. at 20-30 (May 31, 2023), and they have known for at least five months that *Castro-Huerta* jurisdiction was being considered by this Court. As such, there is no need to delay this case for the federal government to file an untimely brief.

The City asserts that the federal government's Motion has sufficiently presented the interest it has in this case and objects to additional briefing. However, should this Court determine it is proper for the federal government to file a brief, the City requests that the briefing be expedited. That the United States wants 30 more days from this Court's order to consult with other agencies

⁴ <https://www.sos.ok.gov/documents/filelog/96765.pdf>; <https://www.sos.ok.gov/documents/filelog/94098.pdf>. The City does not have cross-deputization agreements with the other tribal amici as their reservations do not overlap the City's jurisdiction.

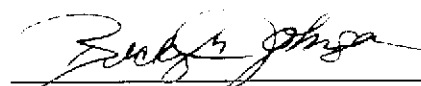
is not a reason to provide the federal government with additional time; it should have consulted the other federal agencies immediately upon or prior to deciding it was going to ask to participate in this case and not wait until after this Court orders briefing. Although the City objects to further briefing, if any additional amicus briefs are permitted by the Court, the City requests that the Court set a deadline of February 29, 2024, so that the briefing is finalized quickly, and the Court can consider the case and render a decision.

WHEREFORE, premises considered, the City of Tulsa prays that this Honorable Court strike the Three Nation's Notice of Supplemental Authority and deny the United States' motion to file an amicus brief or, should the Court allow such brief to be filed, that the Court order the brief to be expedited and filed no later than February 29, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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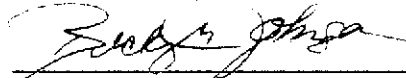
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