IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONALD McGOWAN, **Petitioner,** **-vs.-** **DISTRICT COURT OF McINTOSH COUNTY, ex rel. The Honorable STEVEN W. TAYLOR, District Judge,** **Respondent.**	)	**No. P-98-508**

ORDER ASSUMING ORIGINAL JURISDICTION AND ISSUING WRIT OF PROHIBITION

On May 1, 1998, the above-named Petitioner, through counsel, Richard C. Lerblance, presented to this Court a Petition for Writ of Prohibition and a Brief in Support. Petitioner's complaint concerns a pending criminal prosecution in the District Court of McIntosh County, styled *State of Oklahoma v. Ronald McGowan*, Case No. CF-97-124. Therein Petitioner is charged with Count One: Possession of Marijuana with Intent to Distribute, Count Two: Possession of a Controlled Dangerous Substance (Methamphetamine), Count Three: misdemeanor Driving While Under the Influence of Intoxicants, and Count Four: Possession of Drug Paraphernalia. (O.R. 2-3)

A preliminary hearing was conducted on October 22, 1997, on Counts One and Two before the Honorable Gene F. Mowery, Associate District Judge, acting as Magistrate.[1] At the close of the State's case, Petitioner moved to suppress certain evidence which the State had introduced during the preliminary hearing. The Magistrate sustained the motion to suppress, and the State

[1] Counts Three and Four are not a part of the writ proceedings now before this Court. The record shows these two counts were set upon the District Court's misdemeanor disposition docket separate and apart from the State's appeal of the Magistrate's rulings on Counts One and Two. (O.R. 17, 33).

announced its intent to appeal. An "Application to Appeal" was timely filed by the State on October 23, 1997. (O.R. 18)

On October 27, 1997, Respondent, as Presiding Judge of the East Central Judicial Administrative District, issued an Order assigning the State's appeal to the Honorable Darrell G. Shepherd, Associate District Judge of Wagoner County. (O.R. 19) Subsequently on January 30, 1998, a hearing was conducted before Judge Shepherd pursuant to the State's appeal. Judge Shepherd ordered the Magistrate's decision suppressing the evidence reversed and Defendant bound over for trial as charged in the Information. (O.R. 24)

On April 2, 1998, Petitioner filed a motion requesting the criminal prosecution be dismissed on the grounds the State's appeal was not heard and decided within twenty days of the filing of the State's Application to Appeal as required by 22 O.S.1991, § 1089.2(C). The Motion was presented to Respondent who, on April 2, 1998, denied the Motion. Petitioner now requests this Court "grant a Writ of Prohibition, prohibiting the Petitioner from having to face District Court arraignment . . . and for such other relief this Court deems just and proper." *Petition* at 3.

On May 18, 1998, this Court issued an Order staying enforcement of the January 30, 1998 decision of Judge Shepherd which had reversed the Magistrate's suppression order. Additionally, the Court called for a response from Respondent and permitted an opportunity for reply by Petitioner to such response. On May 29, 1998, Respondent filed its response brief, and on June 8, 1998, Petitioner timely filed a brief in reply.

"The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute in this case." *Canady v.*

with the statute even though the date certain for his decision is a date past the twenty-day period. *Id.*, 1993 OK CR 37 at ¶¶2-3, 859 P.2d at 516. In so holding, *Kahle* specifically overruled *Walker* to the extent that it was inconsistent. We do not find, however, that *Kahle* abrogated the requirement within *Walker* that the appeal hearing itself must be conducted within the twenty-day period in order for the District Court to retain its appellate jurisdiction over the magistrate's decision.

By reason of the foregoing authorities, the Court **FINDS** Associate District Judge Shepherd lost appellate jurisdiction over Magistrate Mowery's suppression order when he failed to commence a hearing upon the State's appeal within twenty days of the filing of the State's "Application to Appeal."[2] In so holding, we do not ignore the State's contention that Petitioner's counsel, when asked if he had an objection to the setting of the appeal hearing past the twenty-day time period, stated he did not care when it was heard.[3] As the assigned judge's appellate authority is fixed by statute, it is not significant that there was no specific objection by Petitioner to the date chosen for the appeal hearing. Moreover, the State does not present the Court with a transcript of the January 30, 1998 appeal hearing demonstrating a lack of any objection by Petitioner.

IT IS THEREFORE THE ORDER OF THIS COURT that original jurisdiction over this matter is assumed and a writ of prohibition is hereby issued

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[2] As we are not faced with the situation where a district court commences the appeal hearing within the twenty-day period but fails to conclude the same prior to the expiration of the twenty days, we leave the resolution of that issue for another day.

[3] In his reply brief, Petitioner's counsel states he does not recall being contacted by the District Attorney or Judge Shepard's Office about the setting of the State's appeal hearing. Petitioner contends instead that the delay in the appeal hearing was the result of the District Attorney's refusal to pay the court reporter for the preliminary hearing transcripts. *Petitioner's Reply* at 1-2. A receipt for the preliminary hearing transcripts filed by the court reporter with the District Court Clerk supports Petitioner's contention. The receipt withdrawing the preliminary hearing transcripts from the clerk contains the notation "D.A. refused to pay for transcripts." (O.R. 21)