IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2011-1115
	)	
RANDALL TERRILL and, DEBORAH ANN LEFTWICH	)	
	)	
	)	
	)	
Appellees.	)	

OPINION

A. JOHNSON, JUDGE:

This is an appeal by the State of Oklahoma from an order entered on December 19, 2011, by Judge Ray C. Elliott of the District Court of Oklahoma County in case No. CF-2010-8067. Judge Elliott's order affirmed a magistrate's ruling sustaining the defendants' demurrer to a conspiracy count added by the State to the charging information at the conclusion of the preliminary hearing. In affirming the magistrate's ruling, Judge Elliott found: (1) the demurrer was properly sustained under the principle known as Wharton's Rule; and (2) there was insufficient evidence to support a probable cause finding of conspiracy.

We agree the evidence presented at preliminary hearing in this case was insufficient to support binding the defendants over on a charge of conspiracy and affirm Judge Elliott's order. It is unnecessary to consider the further issues of multiplicity of charges and the application of Wharton's Rule in this jurisdiction and we decline to do so.

BACKGROUND

Prior to the preliminary hearing, in its Second Amended Information, the State alleged in Count 1 that Terrill offered Leftwich a bribe in exchange for withdrawing her candidacy for an Oklahoma Senate seat, in violation of 26 O.S.2011, § 16-107.[1] Count 2 of that Information charged Leftwich with accepting a bribe to withdraw her candidacy for the Oklahoma Senate, in violation of 26 O.S.2011, § 16-108.[2] The Information alleged in Count 1 that Terrill

> [o]ffer[ed] a thing of value to Deborah Ann Leftwich for her withdrawal of candidacy to wit: by Randall Terrill promising a $80,000 per year job with the Oklahoma Medical Examiner's Office and through political influence and/or intimidation force Deborah Ann Leftwich's appointment to said job in return for Deborah Ann Leftwich withdrawing her candidacy for Oklahoma State Senate Seat 44 . . .

(O.R. at 28). And in Count 2 it alleged that Leftwich

> [a]ccept[ed] a thing of value from Randall Terrill for Deborah Ann Leftwich's withdrawal of candidacy to wit: by Deborah Ann Leftwich soliciting and/or accepting from Randall Terrill his promise of an $80,000 per year

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[1] Title 26 O.S.2001, 16-107, criminalizes the act offering of something of value to induce a withdrawal from candidacy as follows:

> Any person who shall offer or give to another anything of value to induce or cause such other person to withdraw from a political contest as a candidate or nominee at any election shall be deemed guilty of a felony.

[2] Title 26 O.S.2001, 16-108, criminalizes the act of accepting something of value for withdrawing from candidacy as follows:

> Any person who shall solicit or accept from another anything of value for withdrawing from any political contest as a candidate or nominee for any office at any election shall be deemed guilty of a felony.

> job with the Oklahoma Medical Examiner's Office and through political influence and/or intimidation, force Deborah Ann Leftwich's appointment to said job in return for Deborah Ann Leftwich withdrawing her candidacy for Oklahoma State Senate Seat 44 . . .

(O.R. at 28). To meet its evidentiary burden on these two counts, the State presented a number of witnesses at preliminary hearing.

Representative Mike Christian, a Republican, testified that during the 2010 legislative session, in mid to late March, rumors circulated that Appellee Leftwich, then a Democratic Senator, would not run for reelection. Christian, who was considering running for the Senate from Leftwich's district, twice asked Terrill, a member of the Oklahoma House of Representatives leadership, about whether Leftwich was going to run for reelection because he believed Terrill and Leftwich had a close association despite being from different parties. Terrill made no response to those questions.

A summary of the remaining testimony follows.

In mid March or early April 2010, Senator Leftwich met with Tom Jordan, the Chief Administrative Officer of the Medical Examiner's Office, in her office in the Capitol. During that meeting, Leftwich told Jordan she was not going to run for reelection because Representative Mike Christian was going to run for her seat. She also expressed an interest in working for the Medical Examiner's Office in some capacity after she left the Senate. On April 19, 2010, Leftwich, told Senator Patrick Anderson, a Republican, that she was working with "his leadership" to go back to work for the Medical Examiner's Office, but that she could not discuss it.

On May 16th or 17th, Appellee, Representative Terrill, summoned Cherokee Ballard and Tom Jordan of the Medical Examiner's Office to his capitol office. Ballard was the Medical Examiner's Public Information Officer and Legislative Liaison, and Jordan was the Medical Examiner's Chief Administrative Officer. At that meeting, Terrill told Ballard and Jordan that their conversation was "dead man's talk" and indicated that Leftwich should be hired for the position of "Transition Coordinator" that was going to be created in a pending legislative bill (Tr. Prelim. Hrg. Vol. 1 at 27-30). When asked whether Leftwich could legally take the position as a former lawmaker coming to work for a state agency, Terrill responded that she could because the position would not be paid for by appropriated funds, but by funds from some other source.

At a May 17th meeting with Senators Sykes and Leftwich, Representative Terrill dictated an amendment to Senate Bill 738 (SB 738) to a Senate staffer. SB 738 was a lengthy bill that covered a number of matters related to the Office of the Medical Examiner. It was authored by the President Pro-Tempore of the Senate and the Speaker of the House, but was being personally handled by Appellee Representative Terrill and Senator Anthony Sykes. The language dictated by Representative Terrill created a position of "Transition Coordinator" at the Office of the Medical Examiner, specified a salary of $80,000 per year for that position, and set very specific hiring and start dates (Tr. Prelim. Hrg. at 12-14, 22-23). Appellee Senator Leftwich was present for some parts of the meeting.

At a party a week or two before the end of the legislative session, Representative Christian mentioned to some other partygoers that the rumor was

out that Leftwich was leaving the Senate for a job with the Medical Examiner's Office and that he was considering running for her open seat. A day or two later, during a hallway encounter in the capitol building, Terrill told Christian that he needed to be quiet about Leftwich's plans. Shortly after his encounter with Terrill, a tearful Leftwich approached him in a capitol hallway and told him "You need to be quiet. You're going to get me in trouble" (Tr. Prelim. Hrg. Vol. 2 at 200). Christian testified that he did not understand the exhortations to be quiet to involve anything illegal, but instead took them to mean that it simply was out of turn for him as a freshman in the House of Representatives to be discussing a senator's reelection plans before she had made those plans public.

On June 2nd, Terrill met with Jordan and Leftwich at the Warren Theater in Moore, Oklahoma. During that meeting, Terrill pressured Jordan to hire Leftwich even though SB 738 had not been signed by the Governor and the emergency clause that would have made it effective immediately had not passed the Legislature. Jordan refused and sought legal advice from the Attorney General's Office.

At the conclusion of the preliminary hearing, prosecutors orally moved to amend the charging information to add a conspiracy count.[3] The prosecutor gave no specifics of the alleged conspiracy, but simply read aloud the language of the conspiracy statute, 21 O.S. § 424. Terrill and Leftwich demurred to the additional count. In response to the demurrer, the prosecutor argued that the

[3] "MR HARMON: the State of Oklahoma rest, (sic) would ask that the defendants be bound over as charged in the Information, and an additional charge of conspiracy against the State of Oklahoma." Transcript of proceedings had November 4, 2011, Part 2, Defense Witness and Arguments, p. 3.

evidence was sufficient to support an inference that Terrill and Leftwich agreed that Terrill would arrange for a job for Leftwich with the Medical Examiner's Office in exchange for Leftwich not running for reelection (Tr. Prelim. Hrg. Vol. 4 Pt. 2 at 51-55). While the prosecutor suggested that other persons may have been parties to the conspiracy, he did not point to any evidence supporting the claim. The magistrate granted the prosecution's motion to add the conspiracy count, but sustained the defendants' demurrer to the count.

The State appealed the magistrate's ruling to the district court judge. The district court sustained the magistrate finding:

> 1. The demurrer was properly sustained under the principle known as "Wharton's Rule" . . . because of the overlap between the substantive charges set forth in the Information and the *proposed conspiracy charge.*
>
> 2. The demurrer was properly sustained because, taking the evidence in the light most favorable to the government, there was insufficient evidence to bind over the defendants on a charge of conspiracy.

(O.R. at 101).

This appeal followed.

DISCUSSION

This Court reviews a district court's ruling affirming dismissal of a charged count for abuse of discretion. *See, e.g., State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287. We defer to the trial court's finding of facts unless clearly erroneous and review legal conclusions *de novo. Id.* An abuse of discretion is a conclusion or judgment that is clearly against the logic and effects of the evidence presented. *See State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950.

A magistrate's duty at a preliminary hearing is "to establish probable cause that a crime was committed and probable cause that the defendant committed the crime." 22 O.S.2011, § 258; *Moss v. District Court of Tulsa County*, 1989 OK CR 68, ¶ 5, 795 P.2d 103, 105. The State is not required to present evidence at a preliminary hearing sufficient to convict the accused. *Moss*, 1989 OK CR 68, ¶ 5, 795 P.2d at 105. This Court presumes that the State will strengthen its evidence at trial. *Id.* In a State appeal of the ruling of a magistrate on sufficiency of the evidence, the District Court must consider the entire record developed before the magistrate in the light most favorable to the State. 22 O.S. 2011, §§ 1089.4-1089.5; *Moss*, 1989 OK CR 68, ¶ 5, 795 P.2d at 105.

We find the evidence presented at the preliminary hearing, taken in the light most favorable to the State, is insufficient to meet that minimal standard and affirm the judgment of the trial court.

We begin by stating the obvious: conspiracy alone is not a crime. The romantic couple in the old Johnny Mathis song who plan to "conspire as [they] dream by the fire" are not engaged in criminal activity.

The essence of conspiracy is the agreement between two [or more] persons to ***commit a specific unlawful act.*** It is unclear from the preliminary hearing transcript before us what conspiracy, which specific crime, the State intended to allege in its oral motion before the magistrate to amend the information.

In reviewing the lower court's decision here we are limited to the record of the evidence and argument presented to the magistrate. That record supports

our conclusion that the State intended to charge a conspiracy to violate § 16-107 and/or § 16-108 of Title 26, the existing charges before the magistrate.

Just as conspiracy is an inchoate crime [that is an anticipatory crime; conduct intended to culminate in the commission of a defined offense] so are §§ 16-107 and 16-108. A conspiracy to violate both of these statutes, therefore, both creates a double inchoate crime and has the effect of drastically increasing the criminal penalty for essentially the same conduct.[4]

That issue is not squarely before us, however, and we need not address it here. We consider only the sufficiency of the evidence presented.

There is no doubt that Terrill ***and a third person*** could have conspired to ***offer*** Leftwich a thing of value in return for her giving up her seat in the Senate. And it is not beyond the power of artful hypothesis to conclude that Leftwich could have conspired with a third person to ***accept*** his offer in violation of § 16-108.

It stretches the art of hypothesis to near the breaking point, however, to conclude that Terrill and Leftwich conspired that he should offer her a thing of value. We need not find, however, that such a construction is a logical absurdity, because there is simply no evidence to support such a conclusion.

The decision of the court below was right. There is no evidence sufficient to support the last minute proposed addition of this conspiracy charge.

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[4] Title 26, §§ 16-107 and 16-108, as felonies, carry a punishment not exceeding two years imprisonment and/or a fine of $1,000.00. Conspiracy, a violation of 21 O.S. § 244 is punishable by imprisonment of not more than ten years and/or a fine of not more than $25,000.00.

DECISION

The Order of the District Court of December 19, 2011, affirming the magistrate's grant of defendants' demurrer to the conspiracy count is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur in Results
SMITH, V.P.J.: Dissent
LUMPKIN, J.: Concur in Results
WINCHESTER, J.: Concur

LUMPKIN, JUDGE: CONCURRING IN RESULT

I concur in affirming the magistrate's grant of the defendants' demurer. However, I cannot join in the *dicta* discussion that follows the Court's determination that the evidence presented at the preliminary hearing, taken in the light most favorable to the State, is insufficient.

This case should be decided as simply and clearly as possible. See *Taylor v. State*, 2011 OK CR 8, ¶ 3, 248 P.3d 362, 380 (Lumpkin, J., concurring in result) ("Opinions . . . must be written to give clear and consistent interpretations of the law."). More litigation is on the horizon in this matter and the Court should not be expressing any opinion other than the magistrate was correct that there is insufficient evidence to support the conspiracy charge. *Matter of L. N.*, 1980 OK CR 72, ¶ 4, 617 P.2d at 240, 240 ("To offer advice in the form of an opinion would be to interfere with the responsibility of the trial court to exercise the powers confided to it."). This Court has steadfastly refused to issue advisory opinions. *Murphy v. State*, 2006 OK CR 3, ¶ 1, 127 P.3d 1158; *Lambert v. State*, 1999 OK CR 17, ¶ 15, 984 P.2d 221, 229; *Steffey v. State*, 1996 OK CR 17, ¶ 3, 916 P.2d 263, 263; *Canady v. Reynolds*, 1994 OK CR 54, ¶ 9, 880 P.2d 391, 394 ("[A]bsent statutory authority, this Court could not issue an opinion in any matter not at issue before it."); *Matter of L. N.*, 1980 OK CR 72, ¶ 4, 617 P.2d 239, 240 ("An advisory opinion does not fall within the Court's original or statutory

jurisdiction; neither does it come within its appellate review."). There is no reason to break from this precedent in the present case.

As the Opinion openly admits, the issue of whether the offenses set forth in 21 O.S.2011, §§ 16-107, 16-108, are inchoate crimes is not before the Court. As such, the opinion's discussion on this point must be considered *dicta*. "Opinions of a judge which do not embody the resolution or determination of the specific case before the court" are considered *dicta* and therefore "not binding in subsequent cases as legal precedent." Black's Law Dictionary 454 (6th ed. 1990). The conclusions within the Opinion regarding inchoate offenses are not binding on either this Court or the district court. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351 n. 12, 125 S.Ct. 694, 706 n. 12, 160 L.Ed.2d 708 (2005) ("Dictum settles nothing, even in the court that utters it.").

Similarly, the artful hypotheses discussed in the Opinion are not necessary to the determination of the issue before the Court. As such, this discussion is also *dicta* and is not binding on either this Court or any other. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S.Ct. 1114, 1129, 116 S.Ct. 1114 (1996) (Finding that Court is bound by "those portions of the opinion necessary to that result."); *Carroll v. Carroll's Lessee*, 57 U.S. 275, 287, 16 How. 275, 287, 14 L.Ed. 936 (1853) ("[A]ny opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression.").

I am authorized to state that Presiding Judge Lewis joins in this Concur in Result.