

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JENKINS CONSTRUCTION)
CORPORATION, a corporation,)
)
Plaintiff,)
)
vs.)
)
ALBERT J. TOOLE, III,)
et al.,)
)
Defendants.)

NO. 78-C-235-C

FILED

SEP 30 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Now on this 30th day of September, 1978,
on the application to dismiss of the plaintiff herein because
the Court lacks jurisdiction, said application is hereby
granted and the above-captioned case is ordered dismissed
without prejudice at the cost of the plaintiff.

(Signed) H. Dale Cook

JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERMPPLAN OF SOUTH MAIN, INC.,)
)
Plaintiff,)
)
vs.)
)
MAGNOLIA BURKHALTER,)
)
Defendant,)
)
and)
)
UNITED STATES OF AMERICA,)
DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
DIRECTOR, SOUTHWEST REGIONAL)
OFFICE, AUSTIN, TEXAS,)
)
Garnishee.)

No. 78-C-204-C

FILED

SEP 30 1978 *jm*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This action began in the Tulsa County District Court, Small Claims Division, when the plaintiff attempted a garnishment upon the Federal income tax refund of Magnolia Burkhalter, a judgment debtor in the state court. The United States removed the action to this Court and now asks that it be dismissed on the ground of sovereign immunity.

Under Oklahoma law, a garnishment proceeding is, in effect, an original and independent action and is therefore subject to removal to the federal courts. Fleeger v. General Insurance Company of America, 453 F.2d 530 (10th Cir. 1972); Adriaenssens v. Allstate Insurance Company, 258 F.2d 888 (10th Cir. 1958). The United States, as sovereign, is immune from suit except as it consents to be sued, and such waiver cannot be implied but must be unequivocally expressed. United States v. Testan, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); Hill v. United States, 571 F.2d 1098 (9th Cir. 1978). The Internal Revenue Service possesses the same immunity, and 28 U.S.C. §§ 1340 and 1346(a)(1) have been held insufficient to constitute a waiver of that immunity

in actions seeking relief similar to that sought by plaintiff in this case. Phillips v. United States, 346 F.2d 999 (2nd Cir. 1965); Nehf v. United States, 302 F.Supp. 356 (N.D. Ill. 1969); Ceravolo & Comis, Inc. v. United States, 266 F.Supp. 215 (N.D.N.Y. 1967). The plaintiff relies upon May Department Stores Company v. Williamson, 549 F.2d 1147 (8th Cir. 1977), to support its position regarding waiver of sovereign immunity. However, that case involved the United States Postal Service, and the court found a waiver from the authority of the Service to "sue and be sued" given to it by Congress at the time of its creation. No such statute is involved in this action, and Williamson is therefore inapplicable to the facts of this case.

The Court can find no intent on the part of the United States to waive its sovereign immunity in a suit of the type now before the Court. Accordingly, defendant's motion to dismiss is hereby sustained, and this action is dismissed for lack of subject matter jurisdiction.

It is so Ordered this 30th day of September, 1978.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ELTRA CORPORATION,)
)
 Plaintiff,)
)
 vs.) No. 78-C-106-C
)
 OKLAHOMA TELEPHONE SUPPLY,)
 INC., an Oklahoma corporation,)
 M. SUMNERS COMPANY, an)
 Oklahoma corporation, and)
 MYNATT SUMNERS,)
)
 Defendants.)

FILED

SEP 30 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW, on this 30th day of Sept., 1978, comes on for consideration the Motion for Dismissal with Prejudice of the plaintiff and defendants herein in the above entitled cause. The Court finds that said cause has been settled and that the defendants have paid to plaintiff the sum of \$74,000.00 in full settlement, release and satisfaction of plaintiff's cause of action set forth in the Complaint herein, and that plaintiff has accepted said sum in full satisfaction, release and discharge of its cause of action and claim against the defendants; and the Court, after due consideration, finds that said Dismissal should be approved.

IT IS THEREFORE ORDERED that this cause be, and the same is hereby dismissed with prejudice, each party to bear their own costs.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARTY LEE HAMMONS,)
)
) Petitioner,)
v.)
) NO. 78-C-132-B
JERRY M. SUNDERLAND, et al.,)
) FILED
) Respondents.)

SEP 29 1978

O R D E R

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Marty Lee Hammons. Petitioner is a prisoner in the Oklahoma State Reformatory, Granite, Oklahoma, serving a sentence of three years' imprisonment. He was convicted on stipulation in the District Court of Tulsa County, State of Oklahoma, Case No. CRF-77-735, of accessory after the fact, after former conviction of a felony, in violation of 21 O.S. 1971 § 173 and § 51. A direct appeal was perfected to the Oklahoma Court of Criminal Appeals, Case No. F-77-445, and the Judgment and Sentence was affirmed by unpublished opinion filed February 23, 1978. The issues presented in the direct appeal are identical to the issues presented to this Court and State remedies have been exhausted.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Petitioner claims:

1. The Trial Court erred in ordering the Magistrate to overrule Defendant's motions to quash the arrest and suppress the evidence at preliminary hearing and in subsequently overruling said motions at non-jury trial on the stipulation to the preliminary transcript as the arresting officers had no probable cause and there were no exigent circumstances to justify entry into a private residence to make the warrantless arrest, and the evidence obtained thereby was not producible in evidence.
2. The Trial Court erred in ordering the Magistrate to overrule the Defendant's demurrer to the State's evidence at preliminary hearing and in subsequently overruling Defendant's demurrer at non-jury trial on the stipulation to preliminary hearing transcript, as there was insufficient legal evidence to prove the crime.

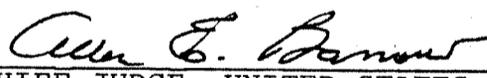
Being fully advised in the premises, having carefully reviewed the petition, response, State file including the transcripts of the preliminary hearing before the Magistrate, appeal therefrom to the District Court, and the briefs on appeal and opinion of the Oklahoma Court of Criminal Appeals, the Court finds that a hearing is not required and the § 2254 petition should be denied.

The State Courts provided a full and fair hearing and opportunity to litigate Petitioner's Fourth Amendment claims. There was first a hearing before the Magistrate and the motions to suppress evidence and quash the arrest warrant were sustained. On appeal by the State to the District Court of Tulsa County there was an additional hearing and the Magistrate was reversed. On appeal of the District Court conviction on stipulation, the Oklahoma Court of Criminal Appeals fully reviewed the transcripts of the preliminary hearing and appeal therefrom. This Court has also reviewed the transcripts. The State has provided an opportunity for and full and fair litigation of Petitioner's Fourth Amendment claims, and Federal habeas corpus review is barred. Stone v. Powell, 428 U. S. 465, rehearing denied 429 U. S. 874 (1976); Sandovall v. Aaron, 562 F.2d 13 (10th Cir. 1977); Gamble v. State of Oklahoma, ___ F.2d ___ (10th Cir. filed Sept. 20, 1978).

Further, the conviction was based on stipulation to the preliminary hearing evidence. The sufficiency of the evidence to convict raises no constitutional question cognizable in this habeas corpus proceeding as the conviction was not so devoid of evidentiary support as to raise a due process issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of the State of Colorado, 425 F.2d 1165 (10th Cir. 1970).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Marty Lee Hammons be and it is hereby denied and the case is dismissed.

Dated this 29th day of September, 1978, at Tulsa, Oklahoma.



CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA

SEP 22 1978

10

HELEN CUNNINGHAM,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY C. WHITELY,)
)
 Defendant.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT
No. 77-C-390-B

STIPULATION FOR DISMISSAL WITH PREJUDICE

Comes now the plaintiff, Helen Cunningham, and the defendant, Larry C. Whitely, and respectfully move the Court to enter an Order dismissing this lawsuit with prejudice against this defendant on the grounds that a compromise settlement has been entered into by these parties.

WHEREFORE, plaintiff and defendant pray that the Court enter an Order dismissing this action against this defendant with prejudice.

Helen Cunningham

Helen Cunningham, Plaintiff

Don L. Dees

Don L. Dees, Attorney for Plaintiff

Tom L. King

Tom L. King
KING, TAGUE & ROBERTS
2301 First National Center
Oklahoma City, Oklahoma 73102
(405) 239-6143
Attorneys for Defendant

FILED

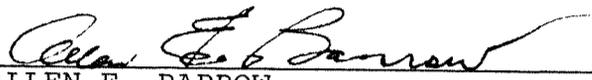
SEP 29 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The above captioned case comes before the Court upon plaintiff's and defendant's Stipulation for Dismissal With Prejudice on the grounds that a compromise settlement has been entered into by these parties. The Court, being fully advised in the premises, finds and concludes that said action against this defendant should be dismissed with prejudice.

IT IS THEREFORE ORDRED, ADJUDGED AND DECREED that this ^{cause of} action ^{and} ^{complaint} be dismissed with prejudice against Larry C. Whitely, defendant herein.



ALLEN E. BARROW
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 28 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

GEORGE A. FARRAR,)
)
 Plaintiff,)
)
 vs.)
)
 NEW YORK LIFE INSURANCE)
 COMPANY, a foreign insurance)
 company,)
)
 Defendant.)

No. 77-C-359-B

GEORGE A. FARRAR,)
)
 Plaintiff,)
)
 vs.)
)
 MUTUAL OF OMAHA INSURANCE)
 COMPANY, a foreign insurance)
 company,)
)
 Defendant.)

No. 77-C-360-B

GEORGE A. FARRAR,)
)
 Plaintiff,)
)
 vs.)
)
 LIFE INSURANCE COMPANY OF)
 NORTH AMERICA, a foreign)
 insurance company,)
)
 Defendant.)

No. 77-C-361-B

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

The plaintiff, George A. Farrar, and defendant, Life Insurance Company of North America, having stated that so much of the above-entitled action, and each and every claim for relief asserted in No. 77-C-361-B may be dismissed with prejudice as to the bringing of a future action thereon, and each party to bear its own costs, and the Court being fully advised, IT IS ORDERED that the plaintiff's causes of action and complaint in No. 77-C-361-B be and the same are hereby dismissed with prejudice to the bringing of a future action thereon and that each party hereto shall bear its own costs.

DATED this 28th day of September, 1978.


CHIEF UNITED STATES DISTRICT JUDGE

FILED

SEP 28 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

GEORGE A. FARRAR,)
)
 Plaintiff,)
)
 vs.)
)
 NEW YORK LIFE INSURANCE)
 COMPANY, a foreign insurance)
 company,)
)
 Defendant.)

No. 77-C-359-B

GEORGE A. FARRAR,)
)
 Plaintiff,)
)
 vs.)
)
 MUTUAL OF OMAHA INSURANCE)
 COMPANY, a foreign insurance)
 company,)
)
 Defendant.)

No. 77-C-360-B

GEORGE A. FARRAR,)
)
 Plaintiff,)
)
 vs.)
)
 LIFE INSURANCE COMPANY OF)
 NORTH AMERICA, a foreign)
 insurance company,)
)
 Defendant.)

No. 77-C-361-B

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

The plaintiff, George A. Farrar, and the defendant, New York Life Insurance Company, having stated that so much of the above-entitled action, and each and every claim for relief asserted in No. 77-C-359-B may be dismissed with prejudice as to the bringing of a future action thereon, and each party to bear its own costs, and the Court being fully advised, IT IS ORDERED that the plaintiff's causes of action and complaint in No. 77-C-359-B be and the same are hereby dismissed with prejudice to the bringing of a future action thereon and that each party hereto shall bear its own costs.

DATED this 28th day of September, 1978.

Allen E. Barrow
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MISSOURI PACIFIC RAILROAD COMPANY,
a corporation,

Plaintiff,

vs.

CYCLE-KART RACERS, INC.,

Defendant.

FILED

SEP 28 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 77-C-471-B

ORDER OF DISMISSAL

NOW on this 28th day of September, 1978, Plaintiff's Motion for Dismissal coming on for consideration and counsel for Plaintiff herein representing and stating that all issues, controversies, debts and liabilities between the parties have been paid, settled and compromised.

IT IS THE ORDER OF THIS COURT that said *cause of and complaint* ~~action~~ *be*, and the same *are* hereby, dismissed with prejudice to the bringing of another or future action by the Plaintiff herein.

Allen E. Bonar

District Judge

CONSENT OF DEFENDANT

The Defendant hereby consents to the above Order.

BERRINGER, BRIGGS, PATTERSON & EATON
Attorneys for Defendant

By *Dale J. Briggs*

Dale J. Briggs

SEP 28 1978

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOHNNIE JOE WELLS, # 91232-1,)
)
) Petitioner,)
v.))
) NO. 78-C-196-B)
))
NORMAN B. HESS, et al.,)
)
) Respondents.)

O R D E R

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Johnnie Joe Wells. Petitioner is a prisoner in the Oklahoma State Penitentiary, McAlester, Oklahoma, upon conviction by jury of robbery with firearms in the District Court of Rogers County, State of Oklahoma, Case No. CRF-75-81, and sentence to twenty years' imprisonment. A direct appeal was perfected to the Oklahoma Court of Criminal Appeals, Case No. F-76-608, and the Judgment and Sentence was affirmed. Wells v. State, Okl. Cr., 559 P.2d 445 (1977).

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Petitioner claims:

1. False evidence of a coerced confession was presented to the jury to obtain his conviction.
2. His conviction was obtained in violation of his privilege against self-incrimination of the Fifth Amendment of the U. S. Constitution and without his being advised of his Miranda rights prior to his confession.
3. The sentence imposed is cruel and unusual punishment and in violation of his right to equal treatment under the law.
4. His conviction was obtained by the unlawful failure of the prosecution to disclose evidence favorable to the defense.

The issues presented to the Oklahoma Court of Criminal Appeals on direct appeal were:

1. Error of the Trial Court in answering a certain interrogatory put to it by the jury outside the presence of the defendant.
2. Certain inadmissible hearsay testimony, elicited from a State witness, was admitted into evidence thereby prejudicing the defendant.
3. Error of the Trial Court in admitting testimony of Rocky Rothrock and permitting the State to impeach his testimony during closing argument.
4. The cross-examination of Grace McCuiston was calculated to arouse the prejudice and passion of the jury, thereby preventing the defendant from having a fair and impartial trial.

5. Error of the Trial Court in failing to submit a circumstantial evidence instruction to the jury.
6. The prosecutor made improper comments in closing argument resulting in prejudice to the defendant.
7. The cumulation of the numerous irregularities which occurred throughout the trial prejudiced defendant's right to a fair trial.

Having carefully reviewed the petition, response, and State files, and being fully advised in the premises, the Court finds that Petitioner's issues to the High State Court on direct appeal were entirely different from those he presents to this Court, and he has not presented his § 2254 contentions to the State Courts in any other proceeding. Therefore, his petition to this Court must be denied, without prejudice, for failure to exhaust adequate and available State remedies.

The State of Oklahoma provides remedies to resolve Petitioner's claims by post-conviction procedure pursuant to 22 O.S.A. § 1080, et seq., and by habeas corpus pursuant to 12 O.S.A. § 1331, et seq. Until Petitioner has availed himself of these adequate and available procedures through the highest State Court on the issues he presents to this Court, his State remedies are not exhausted and his petition to this Court is premature. 28 U.S.C. § 2254(b).

No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegel v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Johnnie Joe Wells be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 28th day of September, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

The Petitioner's first contention does not present a violation of the Constitution of the United States and therefor does not support relief under 28 U.S.C. § 2254. He waived the right under Oklahoma law to have the trial in two stages, the first determining his guilt or innocence of the crime charged and the second to determine sentence when considering the former conviction of a felony. Further, Petitioner took the witness stand in his own defense and in such circumstances, although State law should be followed in State tribunals, there is no Federal constitutional violation warranting habeas corpus relief in showing the essential facts of prior convictions, the nature of the crimes, and the punishment, so long as care is taken to protect the accused from being convicted because of past conduct rather than the crime for which he is on trial. The Trial Court instructed the jury to consider the prior crimes for impeachment and not as guilt of the crime for which he was being tried.

The Petitioner's second, third and fourth contentions are that the prosecutor used improper and prejudicial arguments and cross-examination, and the fifth claim is that the accumulation of errors and irregularities in the trial, when considered as a whole, deprived the Petitioner of a fair trial and due process of law. These contentions are without merit, although this Court agrees with the Oklahoma Court of Criminal Appeals that the errors of counsel could well be sufficient to require granting relief. However, the evidence was substantial and overwhelming and would have supported conviction entirely exclusive of the unprofessional and improper questions and argument of the prosecutor. Reversal of conviction due to extravagant jury argument by the prosecutor is proper only if there is prejudice or if the case is otherwise so weak that assumption of no prejudice is unwarranted. Bryant v. Caldwell, 484 F.2d 65 (5th Cir. 1973) rehearing denied 486 F.2d 1403, cert. denied 415 U. S. 981 (1974).

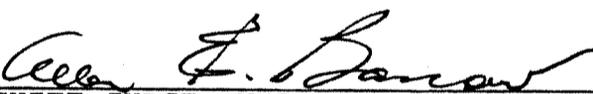
In the instant case, the Petitioner was tried on an information charging assault and battery with a deadly weapon with intent to kill after former conviction of a felony. The jury convicted him of the lesser included offense of assault and battery with a dangerous weapon after former conviction of a felony and assessed a term of ten years' imprisonment. On direct appeal, the Oklahoma Court of Criminal Appeals stated:

". . . after reading the entire record we think that in light of the evidence presented, the prosecutor's prejudicial statements served to cause the jury to increase the sentence it rendered to the defendant rather than to aid it in determining defendant's guilt or innocence. The jury assessed a term of ten years' imprisonment, which was the maximum it could assess for the crime of which it found defendant guilty. Accordingly, we hereby modify this sentence to a term of five (5) years' imprisonment." Robinson v. State, Supra, at page 1072.

Considering the record as a whole, this Court finds that although there was error by the prosecutor, the error was harmless beyond a reasonable doubt in the circumstances before the Court. See, Chapman v. California, 386 U. S. 18 (1967); Berger v. United States, 295 U. S. 78 (1935). The record before this Court does not support a reasonable possibility that the error of the prosecuting counsel contributed to the conviction, and this Court's granting of the Petitioner's § 2254 petition so that he would be tried again is not required. See, Schneble v. Florida, 405 U. S. 427 (1972); Bond v. State of Oklahoma, 546 F.2d 1369 (10th Cir. 1976). From review of the record, this Court has no doubt but that the jury would have reached the verdict of guilt regardless of the error of the prosecutor in his examination and argument, thus the Petitioner suffers no prejudice.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Albert Robinson be and it is hereby denied and the case is dismissed.

Dated this 28th day of September, 1978, at Tulsa, Oklahoma.



CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SEP 26 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

RAY MARSHALL, Secretary of Labor,)
United States Department of Labor,)
Plaintiff,)
v.)
GUARDIAN ENTERPRISES, INC., A)
corporation, and R. C. COWHERD,)
An Individual,)
Defendants.)

Civil Action
No. 75-C-555

JUDGMENT

In accordance with the Findings of Fact and Conclusions of law signed and entered in this action on the 11th day of September, 1978, it is:

ORDERED, ADJUDGED AND DECREED that Defendants, Guardian Enterprises, Inc. and R. C. Cowherd, as well as the agents, servants, employees and those persons in active consort or participation with them are permanently enjoined and restrained from violating the provisions of Sections 206, 207 and 211(c) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, et seq.), hereinafter referred to as the Act, in any of the following manners:

I.

Defendants shall not, contrary to the provisions of Section 6 of the Act, pay any employees engaged in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, wages at rates less than the rates required by Section 6 of the Act.

II.

Defendants shall not, contrary to the provisions of Section 7 of the Act, employ any employee engaged in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, for a work-week longer than 40 hours unless Defendants compensate such

employee for employment in excess of 40 hours in a workweek at a rate not less than one and one-half times the regular rate at which such employee is employed.

III.

Defendants shall not, contrary to the provisions of Section 11(c) of the Act, fail to make, keep and preserve the records required by the Code of Federal Regulations, Title 29, Part 516.

IV.

It is further ORDERED, that Defendants be enjoined and restrained from withholding payment of overtime compensation and minimum wages in the total amount of \$24,237.19, which the Court finds to be due under the Act to Defendants' employees, named in Attachment A hereto, which by reference is made a part hereof. The provisions of this paragraph shall be deemed satisfied when Defendants deliver to the Plaintiff's Regional Solicitor a certified or cashier's check, payable to "Employment Standards Administration, Labor" in the total amount of \$24,237.19. Such payment is ordered to be made within thirty days of the entry of this judgment.

V.

It is further ORDERED, that Plaintiff, upon receipt of such certified or cashier's check from Defendants, shall promptly proceed to make distribution, less income tax and social security withholdings, to Defendants' employees named herein in the amounts so indicated, or to the legal representative of any deceased person so named. If, after making reasonable and diligent efforts to distribute such amounts to the person entitled thereto, Plaintiff is unable to do so because of inability to locate a proper person, or because of a refusal to accept payment by any such person, Plaintiff, pursuant to 28 U.S.C. Section 2041, shall deposit such funds with the Clerk of this Court. Any such funds may be withdrawn for payment to a person entitled thereto upon order of this Court.

VI.

It is finally ORDERED that Defendants will pay the costs of this action.

DATED this 26th day of September, 1978.

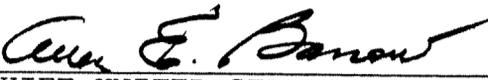

CHIEF UNITED STATES DISTRICT JUDGE

EXHIBIT A

<u>Name</u>	<u>Back Wages</u>
Ron Lancaster	\$ 50.93
Wayne L. Lauderback	10.50
Charles E. Lee	311.33
Ronald W. Lewis	75.60
Gregory Lilinthal	76.44
Richard McClellan	271.26
Charles L. McClure	1166.63
Gary McMillan	496.03
John Marlett	500.26
Joe Martinez	58.80
Helen Mason	234.56
Gerald D. Maxey	44.69
John Mears	608.33
Jo Ann Morgan	5.09
Robert Morgan	54.81
Felix A. Nance, III	290.95
Lester Neely	383.25
Joe E. Nichols	11.03
Robert O'Neil	299.84
Jerry Ortwein	144.28
John Owings	163.80
Roger Perry	300.60
Darrell Persinger	135.60
Bobby J. Powell	12.65
Janice Pruitt	93.69
Robert Reed	54.08
Kenneth L. Rogers	78.75
Carolyn Samuels	129.68
Larry Samuels	283.24
David Sarnowski	38.85
Walter Sasser	30.45
Burley Scott	223.13
Paul Shader	75.08
James R. Smith	263.81
Gene E. Smittle	32.03
Robert Stevens	416.72
Jeffery M. Sullivan	514.26
Herbert L. Sutton	39.11
Carl E. Taylor	69.72
Mary Tyler	162.08
Joseph L. Welborn	1641.15
Henry Whisinhunt	10.00
Daniel B. Williams	705.60
Don Winteringer	34.25
Sid L. Yarborough	685.72
Wanda Young	9.19

EXHIBIT A

<u>Name</u>	<u>Back Wages</u>
Pat Adkins	\$ 333.04
William Barr	532.49
Clyde M. Barrier	422.58
Robert Bates	1504.44
Lyle D. Battey	539.78
Suzanne Bear	17.57
Ronald L. Benight	191.53
George Binnall	91.25
Mike Bird	678.86
Cecil Ray Bledsoe	43.05
Charles F. Brokaw III	43.20
George Brown	68.63
Glen G. Brown	1154.44
Jerry Bulp	437.29
Patrick E. Buchanan	247.92
James K. Bush	208.78
S. G. Butler	1323.72
John Cadman	37.28
Hugh V. Case	36.00
Fred Cervantes	7.88
Nelson Chlouber	27.83
Alvin D. Christian	23.25
Darrell D. Christmas	480.82
Irene Chubber	29.92
Mike Countryman	6.30
John W. Crowson	25.88
Robert Dagnet	57.35
Damon Daniel	237.55
Fred J. Daugherty	57.94
Robert Dunn, Jr.	57.75
Randy Dyer	171.80
Bruce J. Eilers	128.60
Don Estes	12.07
Billy F. Evans	18.78
Ray Foster	110.64
Thomas L. Fowler	40.95
C. W. "Jack" Frost	24.94
Alfred J. Fuller	31.50
Edmond Gebhart	44.10
Arthur J. Gillham	268.79
Larry Greenwood	110.51
Chris Hardesty	154.96
Melva Jo Hardesty	161.02
Alice Hart	119.89
Bennett Harvey	1110.78
Lawrence E. Harvey	27.83
Verna M. Harvey	178.68
Betty Hartman	4.20
David S. Helm	313.71
Ray Holcomb	8.05
Victor C. Horton	74.08
John C. Howe	27.60
Wilford R. Horn	277.08
Weldon Hunt	311.06
Harlan Johnson	134.53
L. J. "Red" Johnson	16.00
Freddy R. Jones	64.00
Dan Kenny	48.89
Claude S. Kindle	9.98

SEP 26 1978

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U.S. DISTRICT COURT

CORDELL SMITH,)
)
) Petitioner,)
v.))
)) NO. 78-C-166-B
))
MACK H. ALFORD, et al.,)
)
) Respondents.)

O R D E R

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Cordell Smith. Petitioner is a prisoner at the Stringtown Correctional Center, Stringtown, Oklahoma.

The pertinent facts relating to his imprisonment are:

In Case No. 20952, in the District Court of Tulsa County, State of Oklahoma, Petitioner was convicted on plea of guilty to First Degree Rape, After Former Conviction of a Felony, and he was sentenced to 25 years imprisonment. He was received at the prison as Inmate No. 71413 in 1965, and he was released on parole from this sentence on December 14, 1973. Said parole was revoked on January 10, 1975.

In Case No. CRF-74-2243, in the District Court of Tulsa County, State of Oklahoma, Petitioner was convicted by jury of robbery with firearms. The jury verdict was set aside and he entered a plea of guilty. He was sentenced to twelve years, eight years in prison and four years on probation. On this sentence he was received at the prison as Inmate No. 89133 in 1974, prior to revocation of his parole in Case No. 20952. A hold has been placed against him for service of the remainder of the sentence in Case No. 20952.

Petitioner contends that his constitutional rights are being violated as he is being required to serve his sentences out of sequence in that he should be serving the revoked parole term in Case No. 20952 prior to serving the sentence in CRF-74-2243. He further contends that his good-time, work, etc., credits on the sentence in Case No. 20952 are being figured pursuant to the provisions of House Bill 1918 (57 O.S.Supp. 1976 § 138) which legislation is ex post facto as to him, with the result that he is serving a longer sentence than originally imposed and if correctly computed it has already expired.

Petitioner's claim to this Court has been presented by petition for writ of habeas corpus to the District Court of Atoka County, State of

Oklahoma; and thereafter, by Case No. H-78-26, to the Oklahoma Court of Criminal Appeals, and relief denied. Petitioner's State remedies on the contentions presented to this Court have been exhausted.

Having carefully reviewed the petition, response, and file, and being fully advised in the premises, the Court finds that Petitioner's allegations are not supported by fact or law, that no constitutional violation is presented, and with no evidentiary hearing required the petition should be denied.

It is entirely proper under Oklahoma law and the circumstances before the Court that Petitioner serve the sentence first in time for the crime committed while he was on parole. Dunn v. Page, Okl. Cr., 450 P.2d 226 (1959); Thurman v. Anderson, Okl. Cr., 500 P.2d 1074 (1972).

House Bill No. 1918, 57 O.S. Supp. 1976 § 138, is more favorable in regard to the computation of good-time credits than was the prior legislation. Further, the statutory good-time credits, under the provisions prior to amendment, were contingent until earned for the entire term. The allowance of these credits was a conditional right not a vested one. The computation of good-time credits amounts to no more than a bookkeeping entry, and the changing of the procedure of bookkeeping from one of giving credit upon admission to prison for good-time that does not vest until earned, and which is contingent on good conduct, to one giving credit upon its being earned, raises no constitutional issue. See, Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Cordell Smith be and it is hereby denied and the case is dismissed.

Dated this 26th day of September, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

SEP 22 1973 110

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

CHARLES R. SMITH,)
)
) Petitioner,)
v.)
))
))
JERRY M. SUNDERLAND, et al.,)
)
) Respondents.)

NO. 78-C-160-B ✓

O R D E R

The Court has for consideration a petition pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Charles R. Smith. Petitioner is a prisoner at the Oklahoma State Reformatory, Granite, Oklahoma, serving a sentence of 30 years imprisonment upon conviction by jury of rape in the first degree, Case No. CRF-76-607, in the District Court of Osage County, State of Oklahoma. On direct appeal, the Judgment and Sentence was affirmed by unpublished opinion of the Oklahoma Court of Criminal Appeals, Case No. F-77-661. The issues presented to this Court were presented to the High State Court and State remedies have been exhausted.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Petitioner claims:

1. Insufficient evidence to sustain the verdict of guilty, and error by the Trial Court in refusing to grant motion for new trial and motion for judgment notwithstanding the verdict based on insufficiency of the evidence.
2. Denial of due process in that the Trial Court refused to give requested instruction on resistance required before rape could be proved.
3. Excessive sentence in view of the facts and circumstances.
4. Error by Trial Court in failing to grant a mistrial when State introduced prejudicial evidence that a knife was used in commission of the crime and failed to produce the knife.

Having carefully reviewed the petition, response, files and transcript in the criminal proceeding, and being fully advised in the premises, the Court finds that an evidentiary hearing is not required, that the petition is without merit and should be denied and the case dismissed.

The sufficiency of the evidence to sustain a conviction in a State Court is not subject to review in Federal habeas corpus unless the conviction is so devoid of evidentiary support as to raise a due process

issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of State of Colorado, 425 F.2d 1165 (10th Cir. 1970). The sole constitutional question is whether the conviction rests upon any evidence at all, and this Court, after a thorough review of the record, finds that Petitioner's conviction does rest upon the evidence presented at trial. Petitioner's first claim is without merit.

Petitioner's second contention is that the Trial Court erred in refusing to give his requested instruction. Habeas Corpus is not available to set aside a conviction on the basis of erroneous jury instructions unless the error had such an effect on the trial as to render it so fundamentally unfair that it constituted a denial of a fair trial in a constitutional sense. Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968) cert. denied 394 U. S. 398 (1969); Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971). This Court finds no such error in the proceedings under consideration.

The third claim that the sentence was excessive is also without merit. When a sentence imposed is within the limits prescribed by statute for the offense committed, it ordinarily will not be regarded as cruel and unusual and does not raise a Federal constitutional question. Karlin v. State of Oklahoma, 412 F.Supp. 635, 637 (W.D.Okla. 1976) citing Edwards v. United States, 206 F.2d 855, 857 (10th Cir. 1953). In the instant proceeding, in the second stage of the trial regarding punishment, after the jury had found the Petitioner guilty of first degree rape, the jury was informed of three prior felony convictions against Petitioner in the State of Missouri. The Missouri crimes were committed on December 31, 1970, and Judgment and Sentence therefor was entered April 27, 1971. Defendant was 18 years of age and an adult under Missouri law, 12-A Mo. Stat. § 211.021. An 18 year old has been considered an adult under Oklahoma law since 1972, 10 O.S.A. § 1101(a).

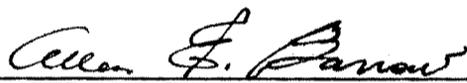
Petitioner's fourth allegation is also without merit as the record shows there was no denial of due process. An alleged error in admitting evidence is not a basis for Federal habeas corpus relief. Trial errors, such as, erroneous admission of evidence cannot afford a basis for a collateral attack. Cassell v. People of the State of Oklahoma, et al., 373 F.Supp. 815 (E.D.Okla. 1973) citing Carrillo v. United States, 332 F.2d

202 (10th Cir. 1964); Alexander v. Daugherty, 286 F.2d 645 (10th Cir. 1961); Schechter v. Waters, 199 F.2d 318 (10th Cir. 1952).

The basic requirement established by the Supreme Court of the United States with respect to habeas corpus petitions is that State prisoners "are entitled to relief on Federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against State action by the Federal Constitution." Townsend v. Sain, 372 U. S. 293 (1963). Where such fundamental rights have not been affected, the Petitioner is not entitled to use the Federal Courts as an additional appeal. Garrison v. Hudspeth, 108 F.2d 733 (10th Cir. 1939); Cobarrubio v. Aaron, No. 76-2112 Unreported (10th Cir. filed July 27, 1977).

IT IS, THEREFORE, ORDERED that the petition pursuant to 28 U.S.C. § 2254 of Charles R. Smith be and it is hereby denied and the case is dismissed.

Dated this 22nd day of September, 1978, at Tulsa, Oklahoma.



CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

L. B. SMITH, INC., a)
Pennsylvania corporation,)
)
Plaintiff,)
)
vs.)
)
G & P MINING, INC., an)
Oklahoma corporation; and)
DOUGLAS KLUSMEYER,)
)
Defendants.)

No. 78-C-377-C

FILED

SEP 21 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT BY DEFAULT

The defendant, G & P Mining, Inc., having failed to plead or otherwise defend in this action and its default having been entered herein,

NOW, upon application of the plaintiff and upon affidavit that the defendant is indebted to plaintiff in the total sum of \$684,791.16, that said defendant has been defaulted for failure to appear, and that said defendant is not an infant or incompetent person and is not in the military service of the United States, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff, L. B. Smith, Inc., recover from the defendant the sum of \$684,791.16, together with interest thereon from this date at the rate of ten percent (10%) per annum and the cost of this action.

DATED this 21st day of September, 1978.

W. J. Alebrook
CLERK OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

SEP 20 1978 ^{NO}

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

CHARLES GLEN HAYES, Reg. No. 90292,)	
)	
v. Petitioner,)	NO. 78-C-139-B —
)	
NORMAN B. HESS, Warden, Oklahoma)	
State Penitentiary, et al.,)	
)	
Respondents.)	

ORDER

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Charles Glen Hayes. Petitioner is a prisoner at the Oklahoma State Penitentiary serving a sentence of 30 years imprisonment upon his conviction of obtaining controlled drug by forged prescription after former conviction of a felony in the District Court of Tulsa County, State of Oklahoma, Case No. CRF-75-190. On direct appeal, Case No. F-75-704, the Oklahoma Court of Criminal Appeals affirmed the Judgment and Sentence, reported Hayes v. State, Okl. Cr., 550 P.2d 1344 (1976). Thereafter, Petitioner filed an application for post-conviction relief which was denied by Order of the Tulsa County District Court dated February 10, 1978, and on appeal, Case No. PC-78-106, the District Court was affirmed by the Oklahoma Court of Criminal Appeals on March 13, 1978. The issues presented to this Federal Court were presented to the State Courts, and State remedies have been exhausted.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, Petitioner claims:

1. The Trial Court erred in applying the provisions of the general Oklahoma habitual offenders statute, 21 O.S. 1968 § 51, to enhance punishment for a special charge in violation of the Uniform Controlled Dangerous Substance Act of Oklahoma, 63 O.S.A. 1971 § 2-407, since the guidelines for enhanced punishment are specifically set out by State Statute, 63 O.S.A. 1971 § 2-407(c) and (d); 63 O.S.A. 1971 § 2-412; and 21 O.S.A. § 11.
2. The Trial Court erred in construing the legislative intent of a special versus a general statute when actual facts were available.
3. The Trial Court lacked constitutionally permissible jurisdiction or authority to pronounce Judgment and Sentence when Petitioner was denied his absolute right to know, and to be specifically advised by the information of the exact offense with which he was charged, the seriousness thereof, and the class of felony of which he stood accused.

Having carefully reviewed the petition, response, State file and transcript, and being fully advised in the premises, the Court finds that a hearing is not required and that the § 2254 petition should be denied and the case dismissed.

On direct appeal, the Oklahoma Court of Criminal Appeals fully, adequately, and accurately considered Petitioner's first two propositions and Federal claims. The High State Court held that punishment for an offense committed under the Uniform Controlled Dangerous Substance Act may be enhanced pursuant to the provisions of the general statute, 21 O.S. § 51, if the prior offense alleged in the information is a conviction not coming within the purview of the special statute. The High Court stated that reason and justice do not require a different result and that they did not believe the Legislature so intended. See, Hayes v. State, Supra.

"It is a general rule that the federal courts will follow the interpretation of the constitution and laws of a state by the highest court of that State, unless such interpretation is inconsistent with the fundamental principles of liberty and justice. Pearce v. Cox, 354 F.2d 884, 891 (10th Cir. 1965) cert. denied 384 U. S. 976, 384 U. S. 977 (1966); Mitchell v. King, 537 F.2d 385 (10th Cir. 1976).

When a State Supreme Court has fully and adequately considered a State prisoner's Federal claims on appeal and in post-conviction proceedings, no further evidentiary hearing is necessary in Federal habeas corpus proceedings. Dhaemers v. State of Minnesota, 456 F.2d 1291 (8th Cir. 1972); Putnam v. United States, 337 F.2d 313 (10th Cir. 1964); Cranford v. Rodriguez, 512 F.2d 860 (10th Cir. 1975).

Petitioner presented the third issue raised in his Federal petition to the State Courts by post-conviction proceeding. That issue was held meritless by Order dated February 10, 1978, by the State District Court, on finding that the issue had been determined by the High Court on direct appeal and would not again be considered. The denial of post-conviction relief was affirmed by Order dated and filed March 13, 1978, of the Oklahoma Court of Criminal Appeals.

63 O.S. 1971 § 2-407 provides in pertinent part, "A. No person shall obtain or attempt to obtain a controlled dangerous substance or

procure or attempt to procure the administration of a controlled dangerous substance: . . . 2. By the forgery . . . of a prescription . . ."

The information filed January 28, 1975, charged attempting to obtain controlled drugs, however, an amended information was filed April 15, 1975, charging obtaining controlled drug by forged prescription after former conviction of robbery with firearms. The Trial Court's instructions to the jury were that Charles Glen Hayes was charged by information with obtaining controlled substance by forged prescription after former conviction of a felony, robbery with firearms. The verdict of the jury was that the said defendant was guilty of obtaining controlled substance by forged prescription after former conviction of a felony and punishment was fixed at 30 years in the State Penitentiary.

On direct appeal, the Oklahoma Court of Criminal Appeals directed, Hayes v. State, Supra. at p. 1349:

"It is noted that the defendant was charged with and the jury returned a verdict of guilty of Obtaining Controlled Drug by Forged Prescription, After Former Conviction of a Felony. However, the Judgment and Sentence on Conviction reads that the defendant was convicted of attempting to obtain controlled drug by forged prescription. This evidently is a scrivener's error and the trial court is directed to correct the Judgment and Sentence by Order Nunc Pro Tunc to reflect the true verdict of the jury."

The directed Nunc Pro Tunc Order was entered May 7, 1976, by the District Court.

Under these circumstances, Petitioner's third issue does not constitute a ground for Federal habeas corpus relief. See, Reay v. Turner, 356 F.2d 418 (10th Cir. 1966).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Charles Glen Hayes be and it is hereby denied and the case is dismissed.

Dated this 20th day of September, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 20 1978

RAY MARSHALL, Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
v.)
)
EUBANKS SECURITY PATROL, Inc.,)
and Edsel F. Eubanks,)
)
Defendants.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT
Civil Action File No.
. 78-C-126-B

JUDGMENT

Plaintiff has filed his complaint and defendants have waived their defenses and have agreed to the entry of judgment without contest, it is, therefore, upon motion of the plaintiff and for cause shown,

ORDERED, ADJUDGED and DECREED that defendants, their officer, agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of sections 6,7, and 11 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. section 201, et seq., hereinafter referred to as the Act, in any of the following manners:

I

Defendants shall not, contrary to section 6 and 15(a)(2) of the Act, 29 U.S.C. §§206 and 215(a)(2), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at a rate less the minimum hourly rates required by section 6 of the Act.

II

Defendants shall not, contrary to sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§207 and 215(a)(2) employ any employee in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

III

Defendants shall not, contrary to sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§211(c) and 215(a)(5), fail to make, keep and preserve adequate and accurate records of the persons employed by them, and the wages, hours and other conditions and practices of employment maintained by them as prescribed by regulations issued by the Administrator of the Employment Standards Administration, United States Department of Labor (29 C.F.R. Part 516).

It is further ORDERED, ADJUDGED and DECREED that the defendants be and they hereby are enjoined and restrained from withholding minimum wages and/or overtime compensation in the total amount of \$11,413.92, which the Court finds is due under the Act to defendants' employees named in Exhibit "A" attached hereto, in the amounts stated for the period March 15, 1975 to August 1, 1977. To comply with this provision of this judgment defendants shall deliver to the plaintiff 12 cashier's or certified checks payable to "Employment Standards Administration-Labor" in the amounts and the times herein set forth:

Payment of \$11,413.92 in 12 equal consecutive quarterly installments of \$951.16, with the first installment being due and payable on/or before January 10, 1978, and the remaining installments being due and payable on/or before the same day of every third succeeding month thereafter until all installments have been paid. Payment of \$11,413.92 on/or before October 10, 1981.

From the proceeds of said payments, plaintiff shall make appropriate distribution to the employees named herein or to their estate if necessary, in the respective amounts due said employees, less income tax and social security deductions. In the event that any of said money cannot be distributed and paid over by plaintiff within the period of one (1) year after payment in full pursuant to this judgment because of inability to locate the proper persons or because of their refusal to accept such sums, the money shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §2041.

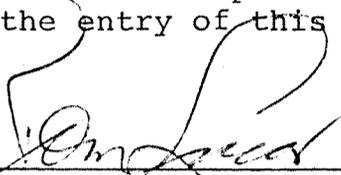
It is further ORDERED, that in the event of default by the defendants in the payment of any of the above-recited installments, the total balance remaining unpaid shall then become due and payable and interest shall be assessed such against such remaining unpaid balance at the rate of 9 percent per annum from the date of this judgment until the total amount is paid in full.

It is further ORDERED that the costs of this action be, and the same hereby are, taxed against defendants for which execution may issue.

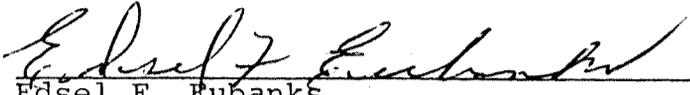
Dated this 20th day of September 1978,


UNITED STATES DISTRICT JUDGE

Defendants waive their defenses to plaintiff's complaint and consent to the entry of this judgment:



Tom Lucas
Attorney for defendants



Edsel F. Eubanks
Defendant

Plaintiff moves for entry of this judgment.

CARIN ANN CLAUSS
Solicitor of Labor

WILLIAM E. EVERHEART
Counsel for Employment Standards

by: Robert E. Luxen
ROBERT E. LUXEN, Attorney

Attorneys for plaintiff.

P.O. Address:

James E. White, Acting
Regional Solicitor
U. S. Department of Labor
555 Griffin Square Bldg, Suite 501
Dallas, Texas 75202

Telephone No.
214/767-4944

EXHIBIT "A"

Martin Anderson	\$203.37
Bobby Ashton	171.72
Charles Ball	200.34
Donald Bell	114.48
Virgil Benson	80.14
Arnold Bratz	85.86
Bradford Breeden	114.48
Clyde Brown	57.24
Lilly Bruner	57.24
John Van Buskirk	85.86
Celia Cagle	57.24
Walter Cagle	314.82
James Clark	57.24
Jim Creason	85.86
James Cruse	171.72
Fred Darling	188.89
Bob Deegraffenreid	143.10
Charles Demars	114.48
Vernell Durant	85.86
Troy Earls	85.86
Bill Evans	57.24
Jim Fitzpatrick	57.24
Gene Freeman	85.86
E. French	57.24
Bob Gaston	286.20
Charlie Gaston	57.24
Judith Gaston	171.72
George Golliher	85.86
Robert Gombas	74.41
Garry Green	57.24
Jerry Green	57.24
Lloyd Gregory	80.14
Walter D. Gregory	85.86
Charles Hall	74.41
Terry Hendrix	85.86
Claude Hill	114.86
Garland Hill	85.86
Jerald Hill	74.41
Ricky Hunt	68.69
Ira Hunter	200.34
Chester Jackson	103.03
Stanley James	57.24
Wilbert Jones	57.24
John King	228.96
Jack Knox	80.14
Steve Kronenbery	57.24
Done Larue	114.48
Thomas Longan	85.86
Jesse Low	74.41
Joe Low	57.24
Leon Lyons	114.48
Richard Lyons	171.72
John Matthews	228.96
Gilmer McCanless	171.72
Ruby Morrill	85.86
Ethel Mueller	57.24
Richard Mueller	143.10
John Newman	114.48
Owen Noshier	85.86
Ronnie Overman	57.24

EXHIBIT "A"

Ivan Pedigo	85.86
Wilburn Pendagrass	285.20
Mike Perkins	143.10
John Philpot	85.86
Ken Powell	85.86
David Priest	114.48
James Qualls	114.48
Jesse Qualls	114.48
Harvey Quigg	286.20
John Redden	286.20
Louis Redden	171.72
Omer Rose, Jr.	57.24
Charles Rousey	85.86
Bill Sanders	57.24
David Sauls	114.48
Roscoe Seay	103.03
James Simmons	143.10
Joe Simpson	103.03
Steve Slane	85.86
Pearl Smith	200.34
Louis Snell	57.24
Ronnie Spears	57.24
Robert Stephens	85.86
Charles Stewart	171.72
Gerald Stice	57.24
John Stout	57.24
Larry Stubblefield	85.86
Harry N. Sutter	143.10
Jack Sweet	228.96
Jim Thompson	85.86
Thomas Tinkel	57.24
Larry Trowbridge	57.24
Duane Troxell	85.86
Bob J. Turney	85.86
Joe Watkins	57.24
Bill Whinery	171.72
Duane Wildey	74.41
Bill Wright	57.24
Rose Wright	150.34
Paul Wyatt	150.34
Kerry Young	85.79
Larry Young	57.24
	<hr/>
	\$11,413.92

under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Petitioner contends that the language of this Rule, by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute except upon motion by the defendant. In the present case there was no such motion.

We do not read Rule 41(b) as implying any such restriction. Neither the permissive language of the Rule---which merely authorizes a motion by the defendant---nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an "inherent power", governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176. It also has the sanction of wide usage among the District Courts. It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.

The Court went on to say:

Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.

The Court finds that plaintiff has not complied with the Order of this Court entered on September 7, 1978, and that this case should be dismissed for failure to prosecute.

IT IS, THEREFORE, ORDERED, SUA SPONTE, that this cause of action and complaint be and the same are hereby dismissed for failure to prosecute.

ENTERED this 20th day of September, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

SEP 19 1978

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
) Plaintiff-Respondent,)
 v.)
)
 JIMMY RAY LEE,)
)
) Defendant-Movant.)

NOS. 78-C-121-B
76-CR-123

O R D E R

The Court has for consideration the pro se, in forma pauperis, motion pursuant to 28 U.S.C. § 2255 filed by Robert Jerry Lee. The cause has been assigned civil Case No. 78-C-121-B and docketed in his criminal Case No. 76-CR-123.

Movant is a prisoner in the Federal Correctional Institution, Seagoville, Texas, pursuant to conviction upon his plea of guilty to an indictment charging in Count One, conspiracy to take, carry away and steal property having a value in excess of \$100 which was moving as and constituted an interstate shipment, with intent to convert it to his own use in violation of 18 U.S.C. § 371. Count Two charged the substantive offense in violation of 18 U.S.C. § 659. On September 23, 1976, Defendant, Movant herein, was sentenced to three years imprisonment on each count, to run concurrently with each other, and concurrently with the sentence Defendant was then serving in the Federal Institution, Texarkana, Texas.

In his § 2255 motion, Movant demands his release from custody and as grounds therefor claims that he is being deprived of his rights guaranteed by the Constitution of the United States of America. In particular, Movant claims that:

1. His plea of guilty was unlawfully induced and not made voluntarily with understanding of the nature of the charges and consequences of the plea, and in contravention of the plea agreement.
2. His counsel was ineffective in advising him as to the consequences of a plea.
3. The Trial Court did not order a pre-sentence investigation and report prior to passing sentence which adversely affected his eligibility for parole.

The Court recalls the plea and sentence of Jimmy Ray Lee, and has carefully reviewed the motion, response, criminal file, and transcript of the plea and sentence. Being fully advised in the premises, the Court finds that the Movant's contentions are clearly refuted by the

record precluding the necessity for an evidentiary hearing, and the motion is without merit and should be overruled.

Movant's plea of guilty on September 23, 1976, was in full conformity with Rule 11, Federal Rules of Criminal Procedure, and constitutional safeguards. The charges and maximum possible sentence were explained to the Defendant by the Court. It was carefully determined that his plea of guilty was entered of his own free choice, without force, threat or promise. Defendant stated that he was satisfied with his attorney. The plea agreement was placed fully on the record by defense and prosecution counsel, and Defendant stated that the plea agreement was correct and as he understood it. After making certain that the Defendant understood that the Court had not participated in any plea bargaining, was not bound by any plea agreement, and was free to impose the maximum sentence as explained to him, the Court accepted the plea agreement and informed Defendant that he would receive the sentence as recommended in the bargain or one more favorable to him, and sentence was imposed in accordance with the plea agreement. The Defendant admitted committing the crimes charged. His plea was taken while he was under oath, after the Court had explained, "You will now be placed on oath, subject to criminal prosecution and punishment for any false statement you may make or perjury you commit connected with and relevant to your plea; do you understand that?"

Neither Court nor counsel is under any obligation to explain the Parole Commission's application of its guidelines prior to or at the time of plea or sentence, but only must insure that the Defendant understands the minimum and maximum sentence provided by law for the offenses committed. A plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same. United States v. Woosley, 440 F.2d 1280 (8th Cir. 1971); Chaney v. United States, No. 76-1116 Unreported (10th Cir. filed Jan. 4, 1977). Movant's first two claims that his plea and sentence were invalid and his counsel ineffective because the conviction in the case here challenged resulted in a lengthening of the period before he would receive parole consideration on his prior sentence under the Parole Commission's application of its guidelines is without merit and does not support collateral relief in this Court.

Movant's third contention that the Court did not obtain a presentence report prior to sentencing which adversely affected his being considered for parole is equally without merit.

Rule 32(c), Federal Rules of Criminal Procedure, provides in pertinent part, "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, . . ." (Emphasis added) Immediately following the Court's acceptance of the Movant's guilty plea, Movant's counsel stated in regard to the presentence report:

"MR. STAINER: He desires to waive.

"DEFENDANT LEE: Yes, sir, I do.

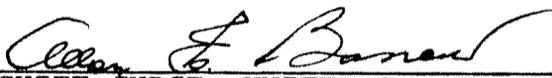
"THE COURT: Do you concur, Mr. Bryant?

"MR. BRYANT: I have no objection, Your Honor."

The Court, with this waiver of a presentence report by Defendant, his counsel, and the prosecuting attorney, permitted the waiver; and after questioning the Defendant, personally, as to any prior record, proceeded to impose the sentence as recommended in the plea agreement.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Jimmy Ray Lee be and it is hereby overruled and dismissed.

Dated this 19th day of September, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

FILED

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 19 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

RAY MARSHALL, Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
) Civil Action File
v.)
) No. 73-C-269
VERNON PRICE, an individual doing)
business as UPRIGHT DRYWALL CO.,)
)
Defendant.)

ORDER

The defendant, Vernon Price, an individual doing business as Upright Drywall Company, having been adjudged guilty of civil contempt of this Court by reason of his failure to obey the terms and provisions of the Orders of the Court entered on March 12, 1976 in the matter styled Ray Marshall v. Vernon Price d/b/a Upright Drywall Co., Civil Action File No. 73-C-269, in the United States District Court for the Northern District of Oklahoma, it is hereby,

ORDERED that defendant, Vernon Price, an individual doing business as Upright Drywall Company, purge himself of the aforesaid civil contempt of this Court by delivering to the plaintiff Ray Marshall, Secretary of Labor, United States Department of Labor, the overtime compensation which this Court found due defendant's employees under the Fair Labor Standards Act of 1938, (29 U.S.C. 201 et seq.) in its judgment of March 12, 1976.

The provisions of this order shall be deemed satisfied when the defendant delivers to the plaintiff 63 cashier's or certified checks, payable to the "Employment Standards Administration - Labor", in the amounts and at the terms herein set forth:

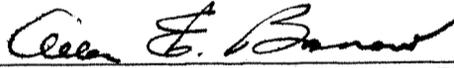
1. Payment of \$6,000 in 12 equal consecutive monthly installments of \$500.00, with the first installment being due and payable on or before November 1, 1978, and the remaining installments being due and payable on or before the same day of each succeeding month thereafter until all 12 installments have been paid.

2. Payment of \$50,000 in 50 equal consecutive monthly installments of \$1,000.00 with the first payment becoming due and payable on or before November 1, 1979, and the remaining installments being due and payable on or before the same day of each succeeding month thereafter until all 50 installments have been paid.

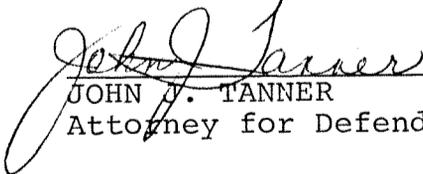
3. A final payment of \$388.89 becoming due and payable on February 1, 1984.

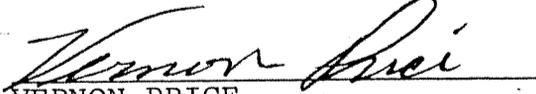
It is further ORDERED that upon defendant's failure to make any one payment on or before the date said payment becomes due and payable, the entire remaining balance of overtime compensation due shall be accelerated and become immediately due and payable.

DATED this 19th day of September, 1978.


UNITED STATES DISTRICT JUDGE

Entry of this Order is hereby consented to:


JOHN J. TANNER
Attorney for Defendant

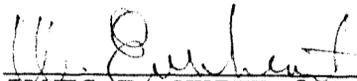

VERNON PRICE
Defendant

Plaintiff moves for the entry of the foregoing Order.

CARIN ANN CLAUSS
Solicitor of Labor

JAMES E. WHITE
Acting Regional Solicitor

WILLIAM E. EVERHEART
Counsel for Employment
Standards



JAMES E. WHITE for
MAX A. WERNICK, Attorney

Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GEORGE HANNEFORD and)
VICTORIA HANNEFORD,)
)
Plaintiffs,)
)
vs.)
)
RUDY JACOBI and PACIFIC SHOW)
OPERATING COMPANY, INC.,)
)
Defendants.)

No. 77-C-415-C

FILED

SEP 18 1973 *rw*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Plaintiffs herein are the owners and operators of a circus known as the Hanneford Family Circus. They allege that the defendants made fraudulent representations to them with the intent to induce them to enter into an appearance contract. They pray for the recovery of certain monetary losses allegedly suffered by them as the result of their reliance on the purported fraudulent misrepresentations. Plaintiffs further pray for an award of punitive damages. Now before the Court are the defendants' Combined Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, and the renewal of those motions.

The defendants' original Combined Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement were directed to the original Complaint. Those combined motions are technically moot because the plaintiffs have filed an Amended Complaint. However, the defendants, in their renewal of those motions, have reincorporated the grounds raised therein.

In support of its Motion to Dismiss, the defendants argue that the Court lacks subject matter jurisdiction, that venue is improper, and that the plaintiffs have failed to state a claim. The defendant Pacific Show Operating Company,

Inc., in addition argues that the Court lacks in personam jurisdiction over it. The ground of most obvious merit is that of improper venue. But before reaching the venue question, the Court must first deal with the question of in personam jurisdiction. See Harris v. Bobby G. Killian Corp., 70 F.R.D. 528 (W.D. Okla. 1975).

Pacific Show Operating Company, Inc. takes the position that it is not subject to the jurisdiction of the Court because it does no business in the State of Oklahoma. The Amended Complaint, however, does allege that Pacific has done business in this state.

A federal district court must look to the law of the State in which it sits to determine whether it has in personam jurisdiction over a defendant. See Jem Eng. & Manu., Inc. v. Toomer Elec. Co., Inc., 413 F.Supp. 481 (N.D. Okla. 1976). Technically, this Court has jurisdiction over Pacific under the Oklahoma long-arm statutes, Title 12 O.S. §§ 187, and 1701.03, which provide that "doing business" in the state is a basis for personal jurisdiction.

The question then becomes whether Pacific has had the requisite "minimum contacts" with this state such that the Court's exercise of jurisdiction over it is consistent with due process.

Plaintiffs allege that in reliance upon the representations made by the defendants, they transported their equipment and personnel from Atlantic City, New Jersey to Sapulpa, Oklahoma and intervening stops to exhibit their circus acts on pre-arranged appearance dates. It is further alleged that a few months prior to this, the defendants, by and through the defendant Rudy Jacobi as agent, entered into an agreement with the Oklahoma Reserve Officers Association, whereby the Association agreed to sponsor and promote circus acts in Oklahoma in exchange for a share of the proceeds from ticket sales. The defendants were also allowed to use

the name of the Association in their promotion of advance ticket sales. The defendants, again through Rudy Jacobi, organized telephone solicitation in Oklahoma to promote ticket sales in advance of the respective appearance dates. The defendants designated an agent in Oklahoma to take charge of this telephone solicitation. Rudy Jacobi traveled to Oklahoma on several occasions to supervise the telephone solicitation and to collect the cash proceeds of advance ticket sales. Finally, the defendants allegedly maintained bank accounts in each of the towns where an appearance was scheduled.

The position of Pacific as alleged is analogous to that of a seller. Courts have commonly found sufficient minimum contacts by a defendant seller who solicits business in this state and profits thereby. See Vemco Plating Inc. v. Denver Fire Clay Co., 496 P.2d 117 (Okla. 1972). Compare Stillings Transp. Corp. v. Robert Johnson Grain & Molasses Co., 413 F.Supp. 410 (N.D. Okla. 1975); Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Okla. 1974). It is alleged that Pacific has likewise solicited business in this state and profited thereby. In addition, Rudy Jacobi allegedly made several trips to Oklahoma as Pacific's agent, and it can be assumed from plaintiffs' allegations that Pacific maintains or maintained a bank account in this state. The "totality of the contacts" authorizes this Court's exercise of in personam jurisdiction over Pacific. See Milligan v. Anderson, 522 F.2d 1202 (10th Cir. 1975).

In support of their claim of improper venue, the defendants argue that the provisions of Title 28 U.S.C. § 1391(a) have not been satisfied. That Section provides as follows:

"A civil action wherein jurisdiction is founded on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district

where all plaintiffs or all defendants reside, or in which the claim arose."

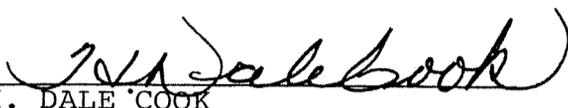
In the Amended Complaint, it is alleged that the plaintiffs were citizens and permanent residents of Florida at the time this action was filed. It is further alleged that the defendant Rudy Jacobi is a citizen of California, and that the defendant Pacific Show Operating Company, Inc. was incorporated and has its principal place of business in Maryland.

None of the plaintiffs are alleged to reside in this judicial district. The residence of the defendant Rudy Jacobi is not alleged. His citizenship is alleged, but citizenship and residence are not necessarily synonymous terms. See Townsend v. Bucyrus-Erie Co., 144 F.2d 106 (10th Cir. 1944). As to Pacific, it is a resident of Maryland, and may be a resident of this district if it is still doing business here. See 28 U.S.C. § 1391(c); Bussey v. Safeway Stores, Inc., 437 F.Supp. 41 (E.D. Okla. 1977). Without getting to the merits of whether Pacific is or is not doing business in this district for the purposes of venue, the Court will assume that it is. But even assuming that, the requirements of Section 1391(a) have not been met because not all of the defendants reside in this judicial district. Section 1391(a) also allows an action to be brought in the district where the cause of action arose. It is not clear exactly where plaintiffs' cause of action arose. It is, however, certain that their cause of action did not arise in this judicial district. The alleged fraudulent misrepresentations which gave rise to this lawsuit occurred some time before plaintiffs began their trip to Oklahoma. It therefore appears that venue is improperly laid with this Court.

For the foregoing reasons, it is therefore ordered that defendants' Combined Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement are moot, and the

defendants' renewal of their Motion to Dismiss is hereby
sustained.

It is so Ordered this 18th day of September, 1978.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

FILED

SEP 18 1978

ALFRED ANDERSON,)
)
 Plaintiff,)
)
 vs.)
)
 PREFERRED RISK MUTUAL INSURANCE)
 COMPANY, a foreign corporation,)
)
 Defendant.)

No. 78-C-124-C

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON this 18th day of September, 1978, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and Plaintiff's counsel specifically waives any claim for attorney fees or sums owed him by the Defendant and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same hereby is dismissed with prejudice to any future action.

Jack C. Silver

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

ROBERT M. BUTLER

Robert M. Butler
Attorney for the Plaintiff

RICHARD D. WAGNER

Richard D. Wagner
Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 14 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

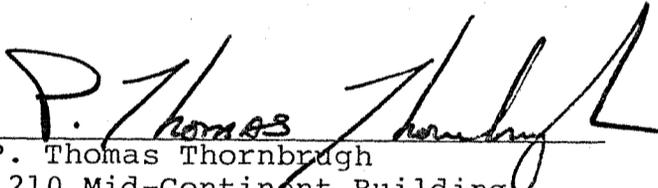
JAMES E. DRAKE, D.D.S. and)
RONALD A. VANTUYL, D.D.S.)
d/b/a DENTAL SERVICES, an)
Oklahoma partnership,)
)
Plaintiffs,)
)
-vs-)
)
BOARD OF GOVERNORS OF REGISTERED)
DENTISTS OF THE STATE OF OKLA-)
HOMA, et al.,)
)
Defendants.)

No. 78-C-410-B

NOTICE OF DISMISSAL OF THIRD CAUSE OF ACTION

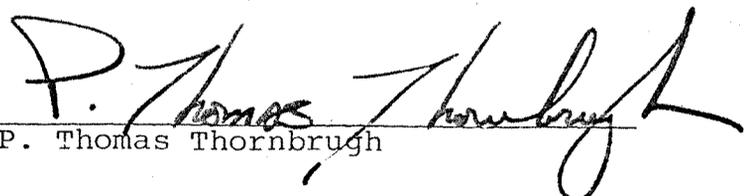
Come now the Plaintiffs, and each of them, by and through their attorney, P. Thomas Thornbrugh, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure stipulate and give notice that the Third Cause of Action contained in the Complaint filed herein on the 24th day of August, 1978, is and should be dismissed without prejudice.

Plaintiffs further state that Defendants and each of them at the time of filing of this notice have not answered or moved for summary judgment.


P. Thomas Thornbrugh
1210 Mid-Continent Building
Tulsa, Oklahoma 74103
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

14th I, P. Thomas Thornbrugh, hereby certify that on the day of September, 1978, a true and correct copy of the foregoing Notice of Dismissal was mailed with sufficient postage thereon to James Poe, Pythian Building, Tulsa, Oklahoma, attorney for Defendants and each of them.


P. Thomas Thornbrugh

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GARLAND RAY WOODRUFF,)
)
 Defendant.)

CIVIL ACTION NO. 78-C-314-B

FILED

SEP 14 1978

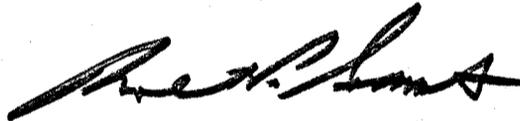
NOTICE OF DISMISSAL WITH PREJUDICE

Jack C. Silver, Clerk
U. S. DISTRICT COURT

COMES NOW the United States of America, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and herewith dismisses the Complaint and Cause of Action previously filed herein on July 6, 1978, with prejudice.

UNITED STATES OF AMERICA

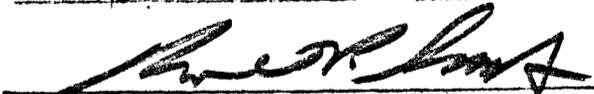
HUBERT H. BRYANT
United States Attorney



ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 14th day of September, 1978.



Assistant United States Attorney

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 12 1978

PUBLIC SERVICE COMPANY)
OF OKLAHOMA, an Oklahoma)
corporation,)
)
Plaintiff,)
)
vs.)
)
ECODYNE CORPORATION,)
a Delaware corporation,)
)
Defendant.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 78-C-175-C

STIPULATION AND ORDER
OF DISMISSAL WITH PREJUDICE

The plaintiff and defendant, having stated that the above-entitled action, and each and every claim for relief asserted therein, may be dismissed with prejudice as to the bringing of a future action thereon, and each party to bear its own costs, and the Court being fully advised, IT IS ORDERED that the plaintiff's causes of action and complaint be and the same are hereby dismissed with prejudice to the bringing of a future action thereon and that each party hereto shall bear its own costs.

DATED this 12th day of September, 1978.

W. Dale Book
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 12 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

LEE EARL HAYES,)
)
Plaintiff,)
)
vs.)
)
HOFFMANN-LaROCHE, INC.,)
)
Defendant.)

No. 77-C-534-C

J U D G M E N T

This action came on for hearing before the Court upon defendant's Motion for Summary Judgment and defendant's Motion to Tax Attorney's Fees as Costs, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

that defendant's Motion for Summary Judgment on plaintiff's claim is hereby sustained and judgment shall be entered for the defendant Hoffmann-LaRoche, Inc. thereon;

that defendant's Motion for Summary Judgment on defendant's counterclaim is hereby sustained and judgment entered in favor of the defendant and against the plaintiff and that damages be assessed in favor of the defendant and against the plaintiff in the total amount of \$3,978.51, plus interest at the rate of 5-1/2% per annum from October 1, 1976 to August 25, 1978 and at the rate of 10% per annum from August 25, 1978; and

that attorney's fees be assessed in favor of the defendant and against the plaintiff in the total amount of \$4,200.00.

DATED this 12th day of September, 1978.

H. Dale Cook

H. DALE COOK,
United States District Judge

APPROVED AS TO FORM AND CONTENT:

Sidney G. Dunagan
Sidney G. Dunagan of
GABLE, GOTWALS, RUBIN, FOX,
JOHNSON & BAKER

Attorneys for Defendant

Steven J. Berg
Steven J. Berg
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANK FITTERMAN and)
ANNA FITTERMAN, Husband and Wife,)
)
Plaintiffs,)
)
v.)
)
GENERAL MOTORS CORPORATION,)
a Foreign Corporation,)
)
Defendant.)

No. 78-C-98-B

FILED

SEP 12 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Now, on this 12th day of ~~August~~ ^{September}, 1978, there came on for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma, Stipulation of the parties hereto of dismissal, parties hereto having advised the Court that all disputes between the parties have been settled.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above-styled cause ^{action & complaint} be, and the same ~~is~~ hereby dismissed with prejudice to the right of the Plaintiffs to bring any further action arising from said cause of action.



HONORABLE ALLEN E. BARROW
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

GRACE RIDGWAY,)
)
 Plaintiff,)
)
 vs.)
)
 S. S. KRESGE COMPANY,)
 d/b/a K-MART,)
)
 Defendant.)

SEP 12 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NO. 78-C-238-B

ORDER OF DISMISSAL

Pursuant to the Application For Dismissal made
and filed herein by the plaintiff, Grace Ridgway, it is
hereby ordered that plaintiff's cause of action ^{and complaint} against the
defendant, S. S. Kresge Company, d/b/a K-Mart, be hereby
dismissed with prejudice and without an award of costs.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AGANA NAVY FLYING CLUB,

Plaintiff,

vs.

AIRCRAFT ENTERPRISES, INC.,
an Oklahoma corporation;
FLIGHT CENTER COMPANY, INC.,
an Oklahoma corporation; and
LOREN ABBOTT AND CHERYL
ABOBOTT, d/b/a INTERNATIONAL
HELICOPTER SALES AND SERVICE
(I.H.I.),

Defendants.

77-C-322-B

FILED

SEP 11 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Motion for Reconsideration of costs taxed in the amount of \$1,274.44, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

Plaintiff complains of costs taxes in the amount of \$1,143.60 to cover the expenses (travel and subsistence) for Colonel Charles M. McManus from Guam to Tulsa and return. In the defendants' Motion for Reconsideration they state:

"Counsel for the defendants would show to the Court that under the provisions of Morrison v. Alleluia Cushion Co., 73 F.R.D. 70, the expense of transporting Col. McManus, the chief officer and representative of the plaintiff, to the trial is not recoverable as costs."

In its responsive brief, although plaintiff indicated in a requested extension of time to respond, to the Motion for New Trial, defendants did not controvert said statement as to the position of Colonel McManus.

IT IS, THEREFORE, ORDERED that defendants' Motion to Reconsider be and the same is hereby granted.

IT IS FURTHER ORDERED that the item of \$1,143.60 costs taxed by the Clerk be disallowed.

ENTERED this 11th day of September, 1978.

R. F. B...

SEP 8 1978

JO

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
) Plaintiff-Respondent,)
)
) v.)
)
) JERRY KENT HARRIS,)
)
) Defendant-Movant.)

NOS. 78-C-388
77-CR-118

O R D E R

The Court has for consideration the motion pursuant to 28 U.S.C. § 2255 of the Defendant-Movant seeking release from sentence imposed by this Court in Case No. 77-CR-118 on the ground that the modification of sentence Order dated May 5, 1978, was imposed in violation of the laws of the United States and that according to the Bureau of Prison authorities said Order cannot be carried out. The § 2255 motion has been assigned civil Case No. 78-C-388 and docketed in criminal Case No. 77-CR-118. Also, Plaintiff-Respondent has filed a motion to correct illegal sentence imposed January 10, 1978, as modified May 5, 1978, on the ground that the sentence did not include the mandatory special parole term as provided in 21 U.S.C. § 841(b)(1)(A).

Having carefully reviewed the file, the Court finds that Defendant-Movant, while represented by retained counsel, entered January 3, 1978, a plea of nolo contendere to a one-count indictment charging that he distributed approximately 25.2 grams of heroin, a Schedule I narcotic controlled substance, in violation of 21 U.S.C. § 841(a)(1). He was sentenced January 10, 1978, as a young adult offender for an indeterminate period pursuant to 18 U.S.C. §§ 4216:5010(b), and the Court requested a 90-day progress report. Thereafter, by Order dated May 5, 1978, a Rule 35, Federal Rules of Criminal Procedure, motion for discretionary modification of sentence was granted, and the Court reduced the sentence of January 10, 1978, to three (3) years regular adult sentence, eligible for parole in the discretion of the Parole Commission pursuant to 18 U.S.C. § 4205(a), said sentence to run concurrently with the sentence imposed in the Western District of Oklahoma.

The Court further finds that the special parole term was fully explained by the Court to the Defendant-Movant prior to the acceptance of his nolo contendere plea. However, said sentence as modified is illegal

and must be corrected in that the statute covering the modified sentence should be 18 U.S.C. § 4205(b)(2), and the special parole term required by 21 U.S.C. § 841(b)(1)(A) was not included in the sentence. Further, the intent of this Court's Order modifying sentence is not being carried out in that the position of the Bureau of Prisons is that it cannot be done under the Order from this Court directing a concurrent sentence with the sentence imposed in the Western District of Oklahoma, and the conflicting Order from the Western District of Oklahoma that the sentence there imposed run consecutive to any other sentence against the Defendant. The sentence should be set aside and the Defendant-Movant returned to Court for resentencing. Mayfield v. United States, 504 F.2d 588 (10th Cir. 1974).

IT IS, THEREFORE, ORDERED that the sentence of Jerry Kent Harris imposed in Case No. 77-CR-118 be and it is hereby set aside,

IT IS FURTHER ORDERED that the United States Marshal for the Northern District of Oklahoma take the said Jerry Kent Harris into custody and produce him before this Court at 11:30 o'clock a.m. Thursday, the 14th day of September, 1978, for resentencing in Case No. 77-CR-118.

Dated this 8th day of September, 1978, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 8 1978

UNITED STATES OF AMERICA and)
JAMES D. DePUE, Special Agent,)
Internal Revenue Service,)

Petitioners,)

vs.)

SHELL OIL COMPANY and)
MICHAEL TUPPS,)

Respondents.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 78-C-325-B

ORDER DISCHARGING RESPONDENT
AND DISMISSAL

On this 5th day of September 1978, Petitioners' Motion To Discharge Respondent And For Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them February 1, 1978, that further proceedings herein are unnecessary and that the Respondents, Shell Oil Company and Michael Tupps, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondents, Shell Oil Company and Michael Tupps, be and they are hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed.



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NATIONAL RAILROAD PASSENGER)
CORPORATION, a foreign)
corporation,)
)
Plaintiff,)
)
-vs-)
)
KOCH INDUSTRIES, INC., a)
corporation; and TRAVELERS)
INDEMNITY COMPANY, an)
insurance corporation,)
)
Defendants,)
)
THE ATCHISON-TOPEKA & SANTA)
FE RAILWAY COMPANY,)
)
Third Party Defendant.)

FILED

SEP 6 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NO. 78-C-3-B

ORDER

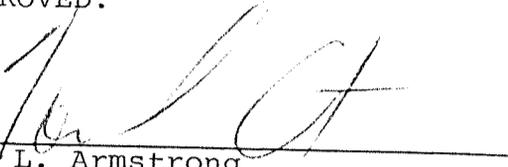
On this ~~7th~~ ^{6th} day of ~~August~~ ^{September}, 1978, this matter came on for ~~hearing~~ ^{consideration} upon the Motion for Summary Judgment of the defendant, Travelers Indemnity Company and for pretrial; all parties being represented by counsel; the court, after hearing statements of counsel finds that plaintiff, National Railroad Passenger Corporation, moves the court for permission to dismiss its Complaint against defendant, Travelers Indemnity Company, and said defendant has no objection to the granting of such motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, Travelers Indemnity Company, is dismissed without prejudice.

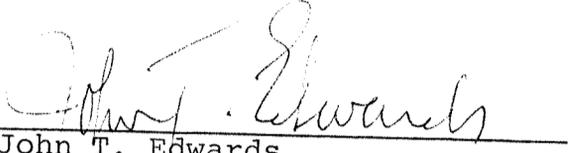
The court further finds additional pretrial is necessary in this case and in order to complete discovery, an additional sixty (60) days will be necessary. The court therefore orders this case be set for additional pretrial October 16, 1978, at 10:30 a.m. ^{before Robert Ryce, US Magistrate} and that all discovery be completed by said date.

Carroll F. Benson
UNITED STATES DISTRICT JUDGE

APPROVED:



Tom L. Armstrong
Attorney for Plaintiff and
Third Party Defendant



John T. Edwards
Attorney for Defendants



IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 6 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

CHESTER A. POTTS, JR., d/b/a)
C. A. POTTS COMPANY,)
)
Plaintiff,)
)
vs.)
)
JOS. SCHLITZ BREWING COMPANY,)
a corporation,)
)
Defendant.)

No. 75-C-238 (C)

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation for Dismissal With Prejudice submitted by the parties in the above captioned case, the Court does hereby enter its order of dismissal with prejudice.

SO ORDERED this 6th day of September, 1978.

W. Dale Cook
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILMA LEFTWICH,

Plaintiff,

-vs-

KIN-ARK, INC., dba
CAMELOT INN,

Defendant.

NO. 78-C-247-C

FILED

SEP 5 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Upon consideration of Defendant's Motion to Dismiss and Plaintiff's Response thereto, wherein Plaintiff confess said motion of Defendant, the Court finds this matter should be dismissed without prejudice.



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) CIVIL ACTION NO. 78-C-207-C
)
 HERSCHEL SAMUEL, JR., DIANE)
 SAMUEL, HOUSING AUTHORITY OF)
 CITY OF TULSA, and JOHN P.)
 KERR, Attorney at Law,)
)
 Defendants.)

FILED

SEP 5 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 5th
day of ~~August~~ ^{Sept.}, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney; the Defendant, Housing Authority
of City of Tulsa, appearing by its attorney, Stephen A. Schuller;
the Defendant, John P. Kerr, Attorney at Law, appearing pro se;
and the Defendants, Herschel Samuel, Jr., and Diane Samuel,
appearing not.

The Court being fully advised and having examined the
file herein finds that Defendants, Housing Authority of City of
Tulsa and John P. Kerr, Attorney at Law, were each served with
Complaint and Summons on May 11, 1978; that Defendant, Herschel
Samuel, Jr., was served with Complaint and Summons on May 15, 1978,
all as appears from the United States Marshal's Service herein; and
that Defendant, Diane Samuel, was served by publication as appears
from the Proof of Publication filed herein.

It appearing that the Defendants, Herschel Samuel, Jr.,
and Diane Samuel, have failed to answer herein and that default
has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon
a mortgage note and foreclosure on a real property mortgage securing
said mortgage note upon the following described real property located
in Tulsa County, Oklahoma, within the Northern Judicial District
of Oklahoma:

Lot Thirty-three (33), Block Five (5),
Lakeview Heights Amended Addition to
the City of Tulsa, State of Oklahoma,
according to the recorded plat thereof.

THAT the Defendants, Herschel Samuel, Jr. and Diane Samuel, did, on the 11th day of April, 1975, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$9,500.00, with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Herschel Samuel, Jr. and Diane Samuel, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$9,382.09, as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from June 1, 1977, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Defendant, Housing Authority of the City of Tulsa, is entitled to Judgment against Defendant, Herschel Samuel, Jr., in personam, and against Defendant, Diane Samuel, in rem, in the amount of \$72.00, plus \$10.00 costs, but that such Judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, John P. Kerr, Attorney at Law, is entitled to Judgment against Defendant, Herschel Samuel, Jr., in personam, and against Defendant, Diane Samuel, in rem, in the amount of \$300.00, but that such Judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Herschel Samuel, Jr., in personam, and Diane Samuel, in rem, for the sum of \$9,382.09, with interest thereon at the rate of 8 1/2 percent per annum from June 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, Housing Authority of the City of Tulsa, have and recover Judgment against the Defendant, Herschel Samuel, Jr., in personam, and against the Defendant, Diane Samuel, in rem, in the amount of \$72.00, plus \$10.00 costs, but that such Judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, John P. Kerr, Attorney at Law, have and recover Judgment against the Defendant, Herschel Samuel, Jr., in personam, and against the Defendant, Diane Samuel, in rem, in the amount of \$300.00, but that such Judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisal the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

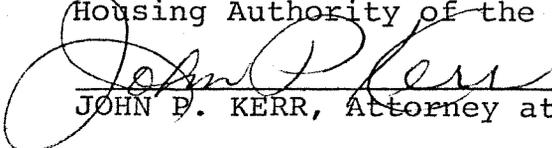
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.


UNITED STATES DISTRICT JUDGE

APPROVED


ROBERT P. SANTEE
Assistant United States Attorney


STEPHEN A. SCHULLER
Prichard, Norman, Reed & Wohlgemuth
Attorneys for the Defendant,
Housing Authority of the City of Tulsa


JOHN P. KERR, Attorney at Law

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

K-Z ENTERPRISES, INC.,

Plaintiff,

vs.

BEATRICE FOODS COMPANY, INC.,

Defendant.

NATIONAL HOCKEY LEAGUE and BOSTON
PROFESSIONAL HOCKEY ASSOCIATION,
INC.,

Plaintiff,

vs.

K-Z ENTERPRISES, INC.,

Defendant.

75-C-155-B

FILED

SEP 1 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT
77-C-57-B
(CONSOLIDATED)

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law filed this date, IT IS ORDERED AS FOLLOWS:

Judgment is entered in favor of K-Z Enterprises, Inc. and against National Hockey League and Boston Professional Hockey Association, Inc. on their complaint in 77-C-57-B.

Judgment is entered in favor of K-Z Enterprises, Inc. on its counterclaim for copyright infringement and against National Hockey League and Boston Professional Hockey Association in 77-C-57-B in the sum of \$20,000, less any sums paid to K-Z Enterprises, Inc. on the \$20,000 judgment rendered in case number 75-C-155-B.

ENTERED this 1st day of September, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

K-Z ENTERPRISES, INC.,

Plaintiff,

vs.

BEATRICE FOODS COMPANY, INC.,

Defendant.

NATIONAL HOCKEY LEAGUE and BOSTON
PROFESSIONAL HOCKEY ASSOCIATION,
INC.,

Plaintiffs,

vs.

K-Z ENTERPRISES, INC.,

Defendant.

SEP 1 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT
75-C-155-B

77-C-57-B

(CONSOLIDATED)

ORDER

This order will deal with the Findings and Recommendations of the Magistrate filed on April 27, 1978, with reference to consolidated case number 77-C-57-B. This litigation was referred to the Magistrate, with the agreement of all parties. 75-C-155-B was tried to a jury and a verdict was duly rendered by said jury. On January 23, 1978, the defendants in case number 77-C-57-B, National Hockey League and Boston Professional Hockey Association, Inc. filed a Motion for Judgment. These defendants will hereinafter be referred to as NHL and BPH respectively. Said Motion was duly briefed by the parties, and was heard before the Magistrate on February 6, 1978. On April 27, 1978, the Magistrate filed his Findings and Recommendations. On May 8, 1978, K-Z Enterprises, Inc. filed a Motion for Court to Amend Magistrate's Findings of Fact and Conclusions of Law. On May 18, 1978, the defendants, NHL and BPH filed their brief in opposition to the Motion to Amend.

The Court has carefully reviewed the Findings of Fact and Recommendations of the Magistrate, and, having carefully

perused the entire file, and, being fully advised in the premises, finds:

In 77-C-57-B, NHL and BPH seek to recover from K-Z Enterprises, Inc. (hereinafter referred to as K-Z) damages and profits due them by virtue of K'Z's assertion of rights in honorary sports contracts incorporating the names and insignia which are the registered marks of the NHL and BPH. NHL and BPH have alleged four causes of action based upon trademark infringement, false representation and false designation of origin, unfair competition, and unjust enforcement, and have asked for statutory damages for trademark infringement, an assignment of all K'Z's asserted copyright in the "Official Honorary National Hockey League Contract," injunctive relief, further damages in the form of K-Z's recovery, if any, in its lawsuit against Beatrice Foods Company, Inc. (case number 75-C-155-B), with which 77-C-57-B is consolidated, and the cost of defending such action, as well as their attorneys' fees. In the NHL and BPH portion of this consolidated action (77-C-57-B), several counterclaims have been asserted by K-Z against NHL and BPH, based upon copyright infringement, conspiracy, violation of trust and fiduciary relationship, fraud and anti-trust, all of which counterclaims have been dismissed with the exception of the counterclaim based upon copyright infringement.

In connection with this Order, reference is made to the Order and Judgment entered this date in 75-C-155-B, wherein this Court, based on the verdict of the jury, has rendered judgment in favor of K-Z and against Beatrice Foods Company, Inc.

The Court has carefully perused the entire file, all briefs, documentation, portions of the transcript on file, the Findings and Recommendations of the Magistrate, and, being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. NHL was organized as an association of members owning professional ice hockey teams. BPH became a member of NHL in 1924 and has remained a member ever since, owning and operating the Boston Bruins hockey team. NHL now consists of 18 members, 3 Canadian and 15 U.S.

2. The NHL and BPH have adopted and used numerous trademarks incorporating certain names and insignia. Since 1917, NHL has been identified by its name--NATIONAL HOCKEY LEAGUE---initials--- NHL and, since 1947, by a shield containing the diagonal letters NHL (the "NHL logo"). Since 1924, BPH's hockey team has been identified as the BRUINS and BOSTON BRUINS; since 1948, it has also been identified by a circled "B" insignia ("B logo"). The registered marks of the NHL and BPH also have come to identify the goods and services of the League and Teams.

3. NHL and BPH also own the following valid, subsisting registrations on the Principal Register in the United States Patent and Trademark Office:

<u>NHL</u>			
<u>No.</u>	<u>Date</u>	<u>Mark</u>	<u>Goods or Services</u>
883,569	12/30/69	NHL	Indicating Membership
897,099	8/18/70	NHL logo	Association Services (promoting members' interests and game of hockey).
939,099	9/10/74	NHL logo	Films, Magazines, Booklets, etc.
957,145	4/10/73	NATIONAL HOCKEY LEAGUE	Indicating Membership
891,762	5/26/70	NHL logo	Indicating Membership
<u>BPHA</u>			
872,363	7/1/69	B logo	Professional ice hockey contests
872,364	7/1/69	BRUINS	Professional ice hockey contests
953,886	2/20/73	BOSTON BRUINS	Professional ice hockey contests

4. National Hockey League Services, Inc. (NHLS) is a

New York corporation owned in equal shares by the eighteen member teams of NHL (including BRUINS). NHL is the authorized agent of NHL and of its members (including BRUINS) for the purpose, inter alia, of licensing on a nation-wide and international basis the aforementioned names and insignia of NHL and, on a similar basis, the names and insignia of all NHL member teams (including BRUINS) together.

5. K-Z is a Utah corporation with its principal place of business in Tulsa, Oklahoma. K-Z, duly domesticated and franchised in the State of Oklahoma, is the manufacturer and distributor of honorary sports contracts and markets the same in interstate commerce.

6. In 1972, there was designed and printed a form of "Official Honorary Major League Baseball Contract", which form of "Contract" was printed and submitted to the Library of Congress together with an application to register claim to copyright, which application resulted in the Certificate of Copyright No. A-319306. K-Z has a valid copyright in the wording of its sports contracts as evidenced by Certificate of Copyright No. A-319306.

7. In the early part of 1972, K-Z contacted NHL for proposing to make and sell "Official Honorary" contracts of NHL and its teams.

8. In response to the presentation made by K-Z, NHL authorized K-Z to produce at least a sample or prototype "Official Honorary National Hockey League Contract". On April 20, 1972, the NHL sent to K-Z a sample of logos to be used in making such prototype.

9. K-Z, at its own expense, designed, prepared and printed a form of "Official Honorary National Hockey League Contract" which included thereon notice of copyright in the name of K-Z.

10. On June 5, 1972, K-Z sent to NHL samples of the NHL contract for its approval. At the same time, K-Z informed NHL that the response on the contract had been good and that they had received inquiries from companies who would be interested in purchasing sports contracts, including the Hockey Contract, for use as a premium.

11. On June 19, 1972, NHL responded to K-Z through its President, Mr. Don V. Ruck, and basically approved of the layout, but requested some changes be made in the design presentation of "National Hockey League".

12. Thereafter, at its own expense, K-Z redesigned, prepared and printed a revised "Official Honorary National Hockey League Contract" and included thereon notice of copyright in its own name. The revised "Official Honorary National Hockey League Contract" was submitted to NHL and was judged acceptable.. The Hockey Contract bearing the trademarks of NHL and BPH and copyright notice of K-Z Enterprises was in the possession of the NHL for over two years.

13. On November 14, 1972, NHL sent to K-Z a proposed licensing agreement authorizing it to make and sell "Official Honorary National Hockey League Contracts".

14. On March 18, 1975, K-Z registered a claim to copyright in its "Official Honorary National Hockey League Contract" with the Library of Congress (Certificate No. A-619003). K-Z owns a valid copyright in the artwork of the Hockey Contract as evidenced by Certificate of Copyright No. A-619003. Copyright Registration A-619003 obtained on the Hockey Contract specifies K-Z's claim to only the artwork of the Hockey Contract as constituting new matter. The copyright registration on the Hockey Contract states:

"The text has been previously published. The new matter consists of the art work of the document."

15. K-Z has never made any claim nor does it claim any rights, title, or interest in any of the NHL or BPH trademarks.

The trademarks were used in the artwork of the National Hockey League Fan Contract with consent of the NHL.

16. The registered "Official Honorary National Hockey League Contract" incorporated as a portion thereof all, or substantially all, of the text of an earlier "Official Honorary Major League Baseball Contract" to which claim to copyright was filed in the name of Richard Zimmerman.

17. Beginning in April, 1974, NHL commenced planning with Beatrice for the offer of an NHL Honorary Draft Certificate on boxes of Swiss Miss instant coca mix. NHL sent Beatrice a copy of the K-Z designed "Official Honorary National Hockey League Contract." John Bendt, Marketing Manager of BEATRICE was aware of and noticed K-Z's copyright notice on the Hockey Contract. Prior to obtaining the Hockey Contract from NHL, Beatrice had committed to pay to NHL, and did subsequently pay the sum of \$15,000.00 for the right to sell an NHL Honorary Draft Certificate and to run 15 sweepstakes with prizes being road trips with the participants favorite NHL team.

18. Beatrice reproduced miniature replicas of K-Z's "Official Honorary National Hockey League Contract" on packages for its commercial Product Swiss Miss instant cocoa mix in connection with its offer of the NHL Honorary Draft Certificates. Upon enlargement, these minatures replicas would have appeared to be identical to the K-Z designed "Official Honorary National League Contract" except: (i) all references to BOSTON BRUINS and the use of the BRUINS' Circles "B" trademark were deleted, (ii) the word "1972-1973 season" did not appear, and (iii) the Copyright Notice in the name of K-Z is not visible. NHL gave oral permission to Beatrice to reproduce the Hockey Contract bearing the trademarks and the copyright notice of K-Z.

19. The aforesaid production by Beatrice was without the consent of K-Z. National advertising by Beatrice for the

promotion did not reproduce K-Z's "Official Honorary National Hockey League Contract."

20. About March 20, 1975, Beatrice received a "Notice of Infringement" from K-Z. Prior thereto, 15,133,227 Swiss Miss cartons had been ordered by Beatrice; 15,089,977 cartons had been received by Beatrice to be packed with Swiss Miss instant, cocoa mix; and 12,080,437 had been distributed by Beatrice; two working days later, the final 43,250 cartons ordered nearly five months before, were shipped to Beatrice; and 3,052,800 cartons were distributed after March 20, 1975. Beatrice made no other subsequent use of Swiss Miss boxes with the NHL Draft Certificate offer.

21. Consumers purchased 31,783 Honorary Draft Certificates from Beatrice pursuant to an offer on the Swiss Miss cartons. \$7,942.53 was received from consumers for these certificates. These certificates differed from K-Z's "Official Honorary National Hockey League Contract".

22. K-Z's Lawsuit, No. 75-C-155-B with which this action is consolidated, against Beatrice claimed infringement of its copyright in the "Official Honorary National Hockey League Contract". On January 13, 1978, a jury verdict was returned in favor of K-Z against Beatrice in the sum of \$20,000 and judgment has been entered this date by separate order and judgment.

23. NHL and BPH, through their agent, NHLS, participated in and contributed to the infringement of the copyrights in the K-Z National Honorary Fan Contract encompassed in Certificates Nos. A-319306 and A-619003.

24. K-Z Enterprises' Copyright Nos. A-319306 and A-619003 are valid and have been infringed by Beatrice and its co-infringers, NHL, BPH and NHLS.

25. NHL and BPH as contributory infringers of K-Z's copyright in the Hockey Contract through their agent NHLS, are jointly and severally liable for the \$20,000 judgment in favor of K-Z against Beatrice in Case No. 75-C-155-B.

26. The use by K-Z of the NHL and BPH registered marks in the Hockey Contract as described in the previous findings of fact in addition to some pre-marketing distribution was with the implied consent of NHL and BPH through their agent, NHLS.

27. K-Z has not infringed any of the NHL or BPH Trademarks.

28. K-Z was not at the time of trial nor was it indicated that it would in the future attempt to offer for sale, advertise, sell or distribute any of the Hockey Contracts. The limited use and distribution made by K-Z of the Hockey Contract was within bounds of the implied consent given by NHLS.

29. Neither NHL nor BPH has shown any damages, harm, or unjust enrichment as a result of K-Z's use of their trademarks.

30. Because of the infringement of the K-Z copyrighted certificates by Beatrice, NHL, BPH and NHLS, K-Z has suffered "in lieu" damages in the sum of \$20,000, provided however that such sum is reduced by any money paid to K-Z on the \$20,000 judgment rendered in Case No. 75-C-155-B.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

1. This Court has jurisdiction of the parties and of the subject matter.

2. NHL and BPH own valid subsisting registration on the trademarks described in Finding of Fact No. 3 above.

3. K-Z neither owns nor claims to own any right, title or interest in the aforementioned trademarks of NHL and BPH.

4. K-Z has a valid copyright in the wording of its sports contracts as evidenced by Certificate of Copyright No. A-319306.

5. K-Z owns a valid copyright in the artwork of the Hockey Contract as evidenced by Certificate No. A-61903.

6. K-Z has not infringed any of the NHL or BPH trademarks because of the fact that such use as was made by K-Z of the NHL and BPH trademarks was with the implied consent of NHL and BPH through their agents NHLS.

7. K-Z's use of the NHL and BPH trademarks neither constitute a false representation nor unfair competition under the Trademark Act of 1946.

8. Neither NHL nor BPH are entitled to injunctive relief since K-Z does not claim to own any right, title or interest in the trademarks of NHL and BPH, nor is K-Z selling, offering for sale, distributing, advertising or making any other use of the hockey contract.

9. Neither NHL nor BPH has shown any damages, harm or unjust enrichment as a result of K-Z's use of their trademarks in the Hockey Contract.

10. K-Z's copyright numbers A-319306 and A-619003 have been infringed by Beatrice and its co-infringers NHL, BPH and NHLS.

11. As a result of the infringement of K-Z's copyrighted certificates by Beatrice, NHL, BPH and NHLS, K-Z has suffered "in lieu" damages in the sum of \$20,000 less any money paid to K-Z on the \$20,000 judgment rendered in Case No. 75-C-155-B.

12. Judgment should be entered in favor of K-Z and against NHL and BPH on their complaint in Case No. 77-C-57-B and for K-Z on its counterclaim for copyright infringement against NHL and BPH in the sum of \$20,000, less any sums paid to K-Z on the \$20,000 judgment rendered in case No. 75-C-155-B.

13. That the Motion for Judgment filed by NHL and BPH should be overruled.

14. That the Motion for Directed Verdict filed by K-Z should be sustained.

ORDER

IT IS, THEREFORE, ORDERED that Judgment be entered by separate instrument this date in conformity with the Findings of Fact and Conclusions of Law herein.

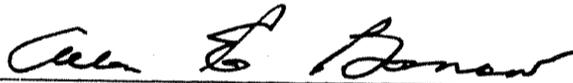
IT IS FURTHER ORDERED AS FOLLOWS:

1. That the Motion to Amend Magistrate's Findings of Fact and Conclusions of Law filed by K-Z Enterprises, Inc., be and the same is hereby overruled.

2. That the Motion for Judgment filed by National Hockey League and Boston Professional Hockey Association, Inc. be and the same is hereby overruled.

3. That the Motion for Directed Verdict of K-Z Enterprises, Inc. be and the same is hereby sustained.

ENTERED this 1st day of September, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

Criminal Appeals dated June 7, 1977; direct appeal; and Petition for Rehearing of direct appeal, denied by Order of the Oklahoma Court of Criminal Appeals dated and filed November 15, 1977; except that Petitioner in the State proceedings did not raise the issue that his conviction was obtained by the knowing use of perjured testimony. This issue he presents to this Court as one facet of his claim that he was denied a fair and impartial trial by the denial of his preliminary hearing transcript. Also, he did not present to the State Courts issue No. 5 that the sentence imposed is cruel and unusual punishment. These two issues, or contentions, will not be considered herein as adequate and available State remedies have not been exhausted. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969) reversed on other grounds, 401 U. S. 560 (1971); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1970).

As to the first issue, this Court in an abundance of caution had prepared and submitted for review the transcript of the preliminary hearing testimony of Loren D. Sunday. This would normally not be required, but in and limited to the instant case with the possibility of unequal treatment because of the Defendant's indigency, the Court has received and reviewed a transcript of this testimony. Therefrom, it is clear that Petitioner's allegation that he was denied a fair and impartial trial in that he was prevented from impeaching the prosecution witness, Loren D. Sunday, is clearly without merit.

In trial, the witness testified (Tr. pp. 177-240, 405-410) that there was extensive fire damage in three areas, the kitchen and living room area on the first level and the attic storage area on the upstairs level, and that this damage was from two fires, one on the lower level involving two rooms with two hot spots joining to make one fire, and the other fire on the upper level, that is, three hot spots and two fires.

The preliminary hearing testimony of this witness was:

"The Chief had suspicions of the fire's origin, as we had separate fires at the location." (Tr. p. 4)

"The fire scene indicated that there had been three separate points of burning; two on the first level, one on the second level." (Tr. p. 6)

"The building involved was a two-story, wooden frame, rock exterior veneer residential dwelling. The fire had occurred in the living room section, the kitchen, and the upstairs attic storage area. The fire scene indicated that there had been three separate points of burning; two on the first level, one on the second level. Physical evidence of the dwelling itself indicated there was no burning between the second and first level." (Tr. p. 6)

"All right, sir. The picture marked State's Exhibit 1 is an area in the attic storage on the second level. It shows the area where the fire burned through the roof, coupling the roof structure. It shows a fire that had burned on top of the roof rafters and shows that fire did not travel from the lower level to the upper level." (Tr. p. 7)

"State's Exhibit 5 shows a scene from the upper level showing the deep charring in the wood, indicating to the burn of the second level. Also showing the soundness of the lumber in the first level, showing there was two separate fires in that area." (Tr. p. 8)

On cross-examination, defense counsel asked: "Okay. First, I would like to go in a little bit to the three hot spots you discussed. Could you tell me where the upstairs hot spot was located in relation to the house? You may use the pictures." Thereafter, the witness testified that the attic area was immediately above the living room area, and above and just west of the kitchen area. (Tr. pp. 18-19)

Defense counsel, himself, throughout his cross-examination at the preliminary hearing referred to "hot spots" not fires. (See, Tr. pp. 18, 19 and 22) There is no conflict between the preliminary hearing and trial testimony of this witness to support impeachment, and this claim is without merit.

The claim that he was denied effective assistance of counsel, presented as a facet of the first issue, is also without merit. In Ellis v. State of Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970) cert. denied, 401 U. S. 1010 (1971) cited with approval in Johnson v. United States, 485

F.2d 240 (10th Cir. 1973), the Court stated:

"The burden on appellant to establish his claim of ineffective assistance of counsel is heavy. Neither hindsight nor success is the measure for determining adequacy of legal representation. 'It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. Goforth vs. United States (10th Cir. 1963), 314 F.2d 868; Williams vs. Beto, 354 F.2d 698, 704 (5th Cir. 1965)."

See also, Gillihan v. Rodriguez, Supra.; Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968) cert. denied, 394 U. S. 938 (1969). Mistakes in judgment or trial practice by the defense counsel do not deprive the accused of constitutional rights and are not reviewable in Federal habeas corpus proceedings. Pierce v. Page, 362 F.2d 534 (10th Cir. 1966), Nor do mistakes in strategy render the assistance of counsel ineffective in the constitutional sense. Frاند v. United States, 301 F.2d 102 (10th Cir. 1962). Review of the record conclusively shows that there is no indication of incompetence on the part of Petitioner's attorney rendering the trial a farce, mockery of justice, or shocking to the conscience of this Court.

The second issue that there was insufficient evidence to convict is without merit. The contention raises no constitutional question cognizable in this habeas corpus proceeding as the conviction was not so devoid of evidentiary support as to raise a due process issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of the State of Colorado, 425 F.2d 1165 (10th Cir. 1970).

The third issue regarding the admission of evidence is meritless. Petitioner's self-serving statements were properly excluded by the Trial Court. It is a well established rule that State Court rulings on the admissibility of evidence may not be questioned in a Federal habeas corpus proceeding, unless they render the trial so fundamentally unfair as to constitute a denial of Federal constitutional rights. Gillihan v. Rodriguez, 511 F.2d 1182, 1192-93 (10th Cir. 1977) cert. denied 434 U. S. 845 (1977); Praxedes v. Cobarrubio v. Ralph Lee Aaron, No. 76-2112 Unreported (filed July 27, 1977).

The challenge that improper, prejudicial statements by the prosecutor were allowed to be made to the jury is without merit. There was

no such statement that would amount to a violation of Petitioner's due process rights. Improper remarks by the prosecutor do not form the basis for overturning the conviction of a State prisoner in a habeas corpus proceeding where the remarks do not result in the deprivation of a fundamentally fair trial. Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966) cert. denied 385 U. S. 905; Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Michael D. McNeil be and it is hereby denied and the case is dismissed.

Dated this 31st day of August, 1978, at Tulsa, Oklahoma.



CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

K-Z ENTERPRISES, INC.,

Plaintiff,

vs.

BEATRICE FOODS COMPANY, INC.,

Defendant.

NATIONAL HOCKEY LEAGUE and BOSTON
PROFESSIONAL HOCKEY ASSOCIATION,
INC.,

Plaintiffs,

vs.

K-Z ENTERPRISES, INC.,

Defendant.

75-C-155-B

FILED

SEP 1 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

(CONSOLIDATED)

JUDGMENT AS TO CASE NUMBER 75-C-155-B

The Court has considered the Jury Verdict returned by the jury duly sworn and empanelled in 75-C-155-B, on January 13, 1978, and being fully advised in the premises,

IT IS ORDERED that Judgment be and is hereby entered in 75-C-155-B in favor of the Plaintiff, K-Z Enterprises, Inc. and against the defendant, Beatrice Foods Company, Inc. in the sum of \$20,000.

ENTERED this 1st day of September, 1978.

Adlai E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

K-Z ENTERPRISES, INC.,

Plaintiff,

vs.

BEATRICE FOODS COMPANY, INC.,

Defendant.

NATIONAL HOCKEY LEAGUE and BOSTON
PROFESSIONAL HOCKEY ASSOCIATION,
INC.,

Plaintiffs,

vs.

K-Z ENTERPRISES, INC.,

Defendant.

75-C-155-B

FILED

SEP 1 1978

Jack C. Silver, Clerk
U. S. DISTRICT COURT

77-C-57-B

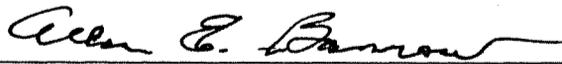
(CONSOLIDATED)

ORDER

The Court has for consideration the Cross-Motion for Attorney's Fee of National Hockey League and Boston Professional Hockey Association, Inc. filed on May 18, 1978, and, being fully advised in the premises, finds that said Motion should be overruled.

IT IS SO ORDERED.

ENTERED this 27 day of September, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

K-Z ENTERPRISES, INC.,

Plaintiff,

vs.

BEATRICE FOODS COMPANY, INC.,

Defendant.

NATIONAL HOCKEY LEAGUE and BOSTON
PROFESSIONAL HOCKEY ASSOCIATION,
INC.,

Plaintiffs,

vs.

K-Z Enterprises, Inc.,

Defendant.

75-C-155-B

FILED

SEP 1 1978

Jack G. Silver, Clerk
U. S. DISTRICT COURT

(CONSOLIDATED)

77-C-57-B

ORDER

Although the above captioned cases are consolidated, they were bifurcated, with 75-C-155-B being tried to a jury before the United States Magistrate (with the agreement of all parties) and 77-C-57-B being a non-jury case. This Order will deal, then only with 75-C-155-B (the jury case).

Trial was commenced in 75-C-155-B on January 11, 1978, and continued through January 13, 1978. The jury, duly selected, empanelled and sworn, returned a verdict on January 13, 1978, in favor of the Plaintiff, K-Z Enterprises, Inc., and against the defendant, Beatrice Foods Company, Inc., in the amount of \$20,000.00.

On January 13, 1978, the Clerk of the Court duly entered judgment in accordance with said verdict.

On January 23, 1978, the defendant, Beatrice Foods Company, Inc., filed a Motion for Judgment Notwithstanding the Verdict, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

On January 23, 1978, the plaintiff filed its Bill of Costs,

and on February 2, 1978, the defendant, Beatrice Foods Company, Inc., in 75-C-155-B, filed an Exception to the Proposed Bill of Costs. A hearing was set by the Clerk of the Court on said Bill of Costs for February 6, 1978, and at said hearing the Clerk taxed costs in the sum of \$341.50. No appeal has been taken from such taxation.

Additionally, on January 23, 1978, the plaintiff, in 75-C-155-B, filed a Motion for Allowance of Attorneys' Fees.

The Magistrate had a hearing on the Motion for Judgment Notwithstanding the Verdict and Motion for Allowance of Attorneys' Fees on February 6, 1978, and on June 27, 1978, Findings and Recommendations of the Magistrate were filed, wherein it was recommended that the Motion for Judgment Notwithstanding the Verdict should be denied and that the Motion for Allowance of Attorneys' Fees should be denied (all in 75-C-155-B).

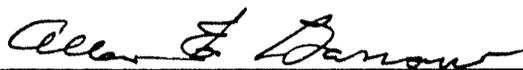
On July 7, 1978, Plaintiff filed a Motion to Amend Findings and Recommendations of the Magistrate (as to the Findings and Recommendations filed on June 27, 1978).

The Court has carefully perused the entire file, and, being fully advised in the premises, finds that the Motion to Amend Findings and Recommendations of the Magistrate filed June 27, 1978, should be denied and overruled.

IT IS, THEREFORE, ORDERED that the Motion to Amend Findings and Recommendations of the Magistrate filed June 27, 1978, be and the same is hereby denied.

IT IS FURTHER ORDERED that the Motion for Judgment Notwithstanding the Verdict and Motion for Allowance of Attorneys' Fees be and the same are hereby denied.

ENTERED this 1st day of September, 1978.



CHIEF UNITED STATES DISTRICT JUDGE