

MAY 23 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

REGINALD LAMOND BRAZELL,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. F-2004-767

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Reginald Lamond Brazell, was tried by jury in the District Court of Oklahoma County, Case Number CF-2003-1408, and convicted of Robbery in the First Degree, After Former Conviction of Two or More Felonies, in violation of 21 O.S.Supp.2003, §§ 797, 798. The jury set punishment at forty (40) years imprisonment, and the trial judge sentenced Appellant in accordance with the jury's determination. Appellant now appeals his conviction and sentence.

Appellant raises the following propositions of error in this appeal:

- I. The State presented insufficient evidence to support Appellant's conviction in violation of the Due Process Clause of the Federal and State Constitutions.
- II. The trial court erred in failing to instruct on the lesser-included crime of robbery in the second degree.
- III. The trial court erred in denying Appellant's requested jury instruction on the eighty-five percent rule and parole eligibility.

After thoroughly considering these propositions and the entire record before us, we find reversal is not required, but modification is.

With respect to proposition one, after viewing the evidence in the light most favorable to the State and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

With respect to proposition two, we find the evidence did not support an instruction on the lesser-included offenses of second-degree robbery. *Taylor v. State*, 2002 OK CR 13, ¶ 4, 45 P.3d 103, 105.

With respect to proposition three, we find, consistent with contemporaneous cases before this Court, that the jury should have been instructed on the applicability of the 85% rule, i.e., 21 O.S.2001, § 13.1. *Anderson v. State*, 2006 OK CR 6, __ P.3d __. We therefore find modification of Appellant's sentence is warranted, and modify his sentence to thirty (30) years imprisonment.¹

DECISION

The judgment is hereby **AFFIRMED**, but the sentence is hereby **MODIFIED** to thirty (30) years. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

¹ Based upon the principle of *stare decisis*, I accede to the application of *Anderson* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson*, which states:

While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal.

2006 OK CR 6, ¶25, __ P.3d at __ (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN W. BRAGG, DISTRICT JUDGE

APPEARANCES AT TRIAL

CHARLES HENRY
ASSISTANT PUBLIC DEFENDER
320 ROBERT S. KERR
SUITE 611
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

APPEARANCES ON APPEAL

KIMBERLY M. TABOR
ASSISTANT PUBLIC DEFENDER
320 ROBERT S. KERR
SUITE 611
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

PAT CRAWLEY
ROBERT SWARTZ
ASSISTANT DISTRICT ATTORNEYS
OKLAHOMA COUNTY
DISTRICT ATTORNEY'S OFFICE
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
THEODORE M. PEEPER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.

CHAPEL, P.J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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prospective manner.