

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

MARCO LAMONTE CARROLL, ) NOT FOR PUBLICATION  
 )  
 Appellant, )  
 )  
 v. ) Case No. F-2010-495  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
APR - 4 2012

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**C. JOHNSON, JUDGE:**

Appellant, Marco Lamonte Carroll, was convicted by a jury in Tulsa County District Court, Case No. CF-2008-3616, of one count of Second Degree Felony Murder (21 O.S.2001, § 701.8) (Count 1) and two counts of Using a Vehicle to Facilitate the Discharge of a Firearm (21 O.S.Supp.2007, § 652(B)) (Counts 2 and 3). On May 14, 2010, the Honorable Kurt G. Glassco, District Judge, sentenced Carroll in accordance with the jury's recommendation to twenty years imprisonment on Count 1, five years imprisonment on Count 2, and six years imprisonment on Count 3, with the sentences to be served consecutively.<sup>1</sup> This appeal followed.<sup>2</sup>

Appellant raises the following propositions of error:

1. The evidence is insufficient to support Appellant's conviction for "Drive-by Shooting" in Count 2, and therefore also insufficient to support Appellant's Second-Degree Murder conviction based on

---

<sup>1</sup> Appellant is required to serve at least 85% of his sentences before being eligible for parole. 21 O.S. § 13.1(2), (5).

<sup>2</sup> Carroll was tried jointly with co-defendant Roy Williams. The jury found co-defendant Williams guilty on the same three charges, and recommended punishment for Williams at twelve years for Count 1, and three years each on Counts 2 and 3. Williams's appeal is before the Court in Case No. F-2010-665.

that felony.

2. Appellant's conviction for Second-Degree Felony Murder must be vacated, because the merger doctrine prohibits using the act that caused the death as the predicate felony in a felony-murder prosecution.
3. Convictions for both Second-Degree Felony Murder, and Use of a Vehicle in the Discharge of a Weapon, constitute double jeopardy under these facts.
4. The trial court abused its discretion in refusing to give Appellant credit for time served in the county jail awaiting trial.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's convictions on Counts 1 and 3, but reverse Count 2 on double-jeopardy grounds.

Appellant accompanied three other men in a drive-by shooting incident, which resulted in the death of one person and injury to another. The evidence showed that three firearms were in the vehicle, and shots were fired from more than one gun. As to Proposition 1, Appellant's acts of accompanying his associates to the neighborhood of a rival gang member, and bringing a loaded firearm of his own, were sufficient for a rational juror to conclude, beyond a reasonable doubt, that he participated in using a vehicle to facilitate the intentional discharge of a firearm, which was the proximate cause of one victim's death. *Douglas v. State*, 1997 OK CR 79, ¶¶ 65-67, 951 P.2d 651, 672. Proposition 1 is denied.

As to Proposition 2, we recently abrogated the judicially-created "merger doctrine," and concluded that the crime of Using a Vehicle to Facilitate the

Intentional Discharge of a Firearm could, in fact, serve as a predicate for Second Degree Felony Murder, consistent with the plain language of statute. *Barnett v. State*, 2011 OK CR 28, 263 P.3d 959, *rehearing granted*, 2012 OK CR 2, — P.3d —. For the reasons given in *Barnett*, we find that the “merger doctrine” does not require reversal of Appellant’s Second Degree Murder conviction.<sup>3</sup> Proposition 2 is denied.

As to Proposition 3, Appellant’s conviction in Count 1 (Second Degree Murder, in the commission of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm) necessarily depended on the same facts used to support the conviction in Count 2 (Using a Vehicle to Facilitate the Intentional Discharge of a Firearm).<sup>4</sup> Multiple convictions based on the same set of facts violate constitutional protections from double jeopardy.<sup>5</sup> *Perry v. State*, 1993 OK CR 5, ¶ 7, 853 P.2d 198, 200-01. Therefore, Appellant’s conviction in Count 2 is **REVERSED WITH INSTRUCTIONS TO DISMISS**.

As to Proposition 4, whether a trial court grants a convicted defendant credit for time served in the county jail is a matter within the court’s discretion, and this Court will presume that the trial court exercised its discretion properly

---

<sup>3</sup> We also held that application of this change to cases pending on direct appeal at the time did not implicate *ex post facto* concerns. *Barnett*, 2012 OK CR 2 at ¶¶ 13-17 (on rehearing).

<sup>4</sup> The two charges of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm were based on two shooting episodes, moments apart. Appellant does not contest the sufficiency of the evidence against him as to the second shooting incident (Count 3).

<sup>5</sup> The State claims that separate convictions are maintainable because there were two people in the vehicle targeted in the first shooting incident, although only one was hit. However, the State never argued this theory at trial, and the court never instructed the jury on it. Rather, the State’s theory at trial was that Count 2 should go to the jury separately as a “backup,” in the event that the jury rejected the felony-murder theory in Count 1.

in the absence of contrary evidence. *Holloway v. State*, 2008 OK CR 14, ¶ 8, 182 P.3d 845, 847; *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 534-35. We find no constitutional or statutory authority for a trial court to give a defendant credit for time served in the county jail pending trial, and therefore question whether a court's refusal to give such credit is even reviewable on appeal. *See Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602. In any event, the record shows that the trial court did not have a "blanket" policy of denying credit for time served pending trial.<sup>6</sup> No relief is warranted, and Proposition 4 is denied.

#### DECISION

Count 2 is **REVERSED WITH INSTRUCTIONS TO DISMISS**. In all other respects, the Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

---

<sup>6</sup> In sentencing Appellant's co-defendant, the trial court gave partial credit for time served.

**APPEARANCES AT TRIAL**

ZACH SMITH  
ATTORNEY AT LAW  
1521 S. DENVER  
TULSA, OK 74119  
ATTORNEY FOR DEFENDANT

ANTHONY EVANS  
STEPHANIE MILBURN  
ASSISTANT DISTRICT ATTORNEYS  
500 S. DENVER, ROOM 406  
TULSA, OK 74013  
ATTORNEYS FOR THE STATE

**OPINION BY C. JOHNSON, J.**

A. JOHNSON, P.J.: CONCUR  
LEWIS, V.P.J.: CONCUR  
LUMPKIN, J.: CONCUR IN RESULTS  
SMITH, J.: CONCUR

RE

**APPEARANCES ON APPEAL**

LEE ANN JONES PETERS  
INDIGENT DEFENSE SYSTEM  
P.O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
JENNIFER B. WELCH  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21st ST.  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR THE STATE