

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 17 2011

MICHAEL S. RICHIE
CLERK

THE STATE OF OKLAHOMA,)
)
 Appellant,)
)
 v.)
)
 DAVID FRANCO,)
)
 Appellee.)

NOT FOR PUBLICATION
No. S 2011-0023

SUMMARY OPINION

LEWIS, VICE PRESIDING JUDGE:

Appellee, David Franco, was charged in the District Court of Cleveland County, Case No. CF-2010-352, with Counts 1, 2 and 3 – Use of a Vehicle in Discharge of a Weapon in Concert with Joel Christian Aranda, Count 4 – Assault and Battery with a Dangerous Weapon in Concert with Joel Christian Aranda, Count 5 – Feloniously Pointing a Firearm in Concert with Joel Christian Aranda, and Count 6 – Assault and Battery with a Dangerous Weapon in Concert with Joel Christian Aranda.

The preliminary hearing was held December 15, 2010. The Magistrate, the Honorable Steven L. Stice, found probable cause to believe that the crimes in Counts 2, 4, 5 and 6 were committed and that Mr. Franco committed those crimes. Magistrate Stice sustained demurrers to Counts 1 and 3. The State appealed the ruling to the District Court. Following a hearing January 3, 2011, the Honorable George Butner, District Judge, affirmed Judge Stice’s ruling.

From this adverse ruling, the State appeals to this Court pursuant to Section 1089.7 of Title 22. The appeal was automatically assigned to the Accelerated Docket of this Court. See Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011). Oral argument was held August 25, 2011, pursuant to Rule 11.2(F).

On appeal the State argued the District Judge erred by affirming the decision of the Magistrate. The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime. 22 O.S. Supp.2003, § 258(Eighth). The standard of review, set out in Section 1089.5 of Title 22, is “whether the evidence, taken in the light most favorable to the State, is sufficient to find that a felony crime has been committed and that the defendant probably committed said crime.” Absent an abuse of discretion in reaching that determination, the magistrate’s ruling will remain undisturbed. See *State v. Weese*, 1981 OK CR 19, 625 P.2d 118. In this case the State has not met its burden. As such, we will not interfere with the judgments of the lower courts.

DECISION

The order of the District Court of Cleveland County dismissing Counts 1 and 3 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE STEVEN L. STICE, MAGISTRATE
THE HONORABLE GEORGE BUTNER, DISTRICT JUDGE**

APPEARANCES AT TRIAL

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OPINION BY: LEWIS, V.P.J.

JOHNSON, A., P.J.: Concur
LUMPKIN, J.: Concur
JOHNSON, C., J.: Concur
SMITH, J.: Not Participating

RE

APPEARANCES ON APPEAL

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