

MAR - 9 2006

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

FRANKLIN LEE GIBBS, JR.,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2004-649

OPINION

A. JOHNSON, J.:

Franklin Lee Gibbs, Jr., Appellant, was tried by jury in the District Court of Pittsburg County, Case No. F-2004-29, and convicted of Count I, First-Degree Murder in violation of 21 O.S.2001, § 701.7(A) and Count II, Felon in Possession of a Firearm, After Former Conviction of Two Felonies in violation of 21 O.S.Supp.2002, § 1283. The jury fixed Gibbs's punishment at life imprisonment without the possibility of parole on Count I and 50 years imprisonment on Count II. The trial court sentenced him accordingly and ordered the sentences to run concurrently. From this Judgment and Sentence, Gibbs appeals. We reverse.

A recitation of the facts is not necessary as this case must be reversed and remanded for new trial because of an error in jury selection. Gibbs argues in his second proposition that the trial court's award of only five peremptory challenges during jury selection in his first degree murder trial

denied him due process.¹ We recently addressed this identical claim and held that the denial of the full complement of statutorily prescribed peremptory challenges in a first degree murder case is reversible error. *Golden v. State*, 2006 OK CR 2, ¶ 19, 127 P.3d 1150. *Golden* is dispositive. Because Gibbs was only given five peremptory challenges instead of nine, his case must be reversed for a new trial.

We also address Proposition III to avoid any error on retrial. Gibbs asserts that the trial court erred when it allowed the prosecutor to use his three prior convictions to enhance his first-degree murder charge. The record shows that the State filed a second page and sought to enhance Gibbs's sentence on his felon in possession charge (Count 2) with two of his three prior felony convictions.² Gibbs's three prior felony convictions were also included in the title of the first-degree murder verdict form, which read, "MURDER, FIRST DEGREE AFTER THREE PREVIOUS CONVICTIONS." Gibbs contends the inclusion of his three prior convictions in the first-degree murder verdict form's title acted as evidence to enhance his sentence from life with the possibility of parole to life without the possibility of parole. Gibbs objected to the verdict form on this basis at trial.

It is obvious that the State cannot enhance a non-capital first-degree murder conviction with a defendant's prior convictions. The punishment

¹ Title 22 O.S.2001, § 655 explicitly grants both parties in a first-degree murder case nine peremptory challenges.

range for persons who have been twice convicted of felony offenses, and who subsequently commit an enumerated offense in 57 O.S.2001, § 571 within ten (10) years of the previous convictions, is twenty (20) years to life imprisonment. 21 O.S.2001, § 51.1(B). Punishment for first-degree murder is death, life imprisonment without parole, or life imprisonment. 21 O.S.2001, § 701.9(A). Although first degree murder is an enumerated offense in § 571 and thus a crime potentially subject to enhancement, permitting enhancement would allow habitual offenders to receive a punishment range less than that prescribed for first time offenders charged with first-degree murder. Such a construction is unreasonable. Rules of statutory construction require us “to ascertain and give effect to the intention of the Legislature as expressed in the statute.” *State v. Anderson*, 1998 OK CR 67, ¶ 3, 972 P.2d 32, 33 (citing *Thomas v. State*, 1965 OK CR 70, ¶ 4, 404 P.2d 71, 73). We look to “each part of the [statute], to other statutes upon the same or relative subjects, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation.” *Thomas*, 1965 OK CR 70, ¶ 4, 404 P.2d at 73. Allowing enhancement of a first-degree murder sentence yields “absurd” consequences and cannot be permitted.

It was error to include Gibbs’s prior convictions in the title of the first-degree murder verdict form as Gibbs’s murder charge could not be enhanced.

² One of Gibbs’s prior convictions was used as an element of the felon in possession charge and could not be used to then enhance his sentence.

On retrial, Gibbs's prior convictions may be used only to enhance his felon in possession charge and not his first degree murder charge.

The Judgment of the district court is **REVERSED** and this matter is **REMANDED** to the district court for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: A. JOHNSON, J.

CHAPEL, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs in Results
C. JOHNSON, J.: Concurs
LEWIS, J.: Concurs

RC

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