

FEB 10 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RIGHIE
CLERK

DARRELL W. HOGAN,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2004-1266

OPINION

CHAPEL, PRESIDING JUDGE:

Darrell W. Hogan was tried by jury and convicted of First Degree Murder in violation of 21 O.S.2001, § 701.7, in the District Court of Pittsburg County, Case No. CF-2004-300. Following the jury's recommendation, the Honorable Thomas M. Bartheld sentenced Hogan to life imprisonment without the possibility of parole. Hogan has perfected his appeal of this conviction.

On the morning of February 24, 2004, Darrell Hogan killed his cellmate, James Wise, at the Oklahoma State Penitentiary. Early that morning, Wise had held a knife to Hogan's throat, threatening to kill him if he failed to hand over later-acquired canteen items. When Hogan agreed, Wise withdrew and put away the knife.

About two hours later, Hogan placed a sheet over the cell door window to bar outsiders' view. He removed the drawstring from a laundry bag, choked Wise with it until Wise collapsed approximately five minutes later, then flushed the drawstring down the toilet and summoned a guard. Wise was taken for

immediate medical attention for his injuries but died three weeks later. Hogan was interviewed by an internal investigator and confessed to killing Wise.

Hogan raises a single proposition of error, claiming entitlement to a new trial because he was denied full exercise of his peremptory challenges. A defendant on trial for first-degree murder is entitled to nine (9) peremptory challenges.¹ Hogan was only allowed five (5) peremptory challenges at trial. Due process is violated when a defendant is denied a statutory right.² Moreover, this Court recently reversed a case for this precise error.³ We reverse and remand Hogan's Judgment and Sentence for a new trial.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

¹ 22 O.S.2001, § 655.

² *Golden v. State*, 2006 OK.CR 2, ___ P.3rd ___; (denial of statutorily mandated peremptory challenges mandates reversal).

³*Id.*

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	DISSENT
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

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LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

As I stated in my dissent to *Golden v. State*, 2006 OK CR 2, I disagree with this Court finding a harmless error analysis is not applicable to the denial of the statutory right of 9 peremptory challenges in a first degree murder trial. As in *Golden*, constitutional error occurred here as Appellant's statutory right to peremptory challenges was denied or impaired by not receiving that which state law provides. However, except for certain specifically delineated situations, constitutional errors have historically been subject to a harmless error analysis. See *Neder v. U.S.*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L.Ed.2d 35 (1999), *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). See also *Bartell v. State*, 1994 OK CR 59, 881 P.2d 92.

Applying a harmless error analysis to the present case, I find the error harmless beyond a reasonable doubt. The record shows that at trial defense counsel did not object to the limited number of peremptory challenges. Now on appeal, Appellant has not argued or shown he was prejudiced by the lack of peremptory challenges. As I cannot find error from a silent record, or prejudice from anything in the current record, the violation of the statutory right in this case was harmless, and the judgment and sentence should be affirmed.