

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 12 2001
JAMES W. PATTERSON
CLERK

ROBERT G. KIRKPATRICK,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) NOT FOR PUBLICATION

) Case No. F 2000-1157

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Robert G. Kirkpatrick, was convicted by a jury of Assault and Battery with a Dangerous Weapon, in violation of 21 O.S.Supp.1998, § 645, in Garfield County District Court, Case No. CF-99-370. Jury trial was held before the Honorable John W. Michael, District Judge, on March 27, 2000. On April 18, 2000, in accordance with the jury's recommendation, Judge Michael sentenced Appellant to time served. We granted Appellant an appeal out of time and thereafter he filed this appeal. *See Kirkpatrick v. State*, PC 2000-846 (Okl.Cr. August 25, 2000)(not for publication).

Appellant raised two propositions of error:

1. The trial court committed fundamental error in not instructing on the definition of a "dangerous weapon" and by not instructing on the lesser included offense of simple and assault and battery; and Mr. Kirkpatrick received ineffective assistance of counsel when his trial counsel failed to request these instructions; and
2. The trial court erred in not giving a self-defense instruction.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that relief is required on Proposition 2 for the reasons set forth below.

Appellant was working as a licensed security guard at the Mexican dance when the alleged assault and battery occurred. Appellant, acting in his capacity as a licensed security guard did not engage in mutual combat; rather, he was attempting to maintain order and protect persons and property. See 59 O.S.Supp.1998, § 1750.2.

Title 22, Section 39 states that “[a]ny citizen who shall be aiding in the maintaining of law and order shall likewise be entitled to the benefits of this act.” The referenced benefits include the qualified criminal immunity available to peace officers when not using excessive force. See 22 O.S.1991, § 34.1. The language “any citizen” in Section 39 is broad enough to include licensed security guards who are acting within the scope of their employment.

Further, the legislature has provided that any citizen may lawfully resist public offenses. See 22 O.S.1991, §§ 31-33; *Whitechurch v. State*, 1983 OK CR 9, 657 P.2d 654. Appellant was justified in using a reasonable amount of force to maintain order and to protect persons and property.

Had the jury been properly instructed on either of these two points, we have no doubt that it would have found Appellant not guilty of any crime. This Court has the power to reverse, affirm or modify Appellant’s conviction. 22

O.S.1991, § 1066. For the above reasons, we find Appellant's conviction for Assault and Battery with a Dangerous Weapon should be **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. Proposition 1 need not be addressed.

DECISION

The Judgment and Sentence of the trial court is **REVERSED AND REMANDED TO THE TRIAL COURT WITH INSTRUCTIONS TO DISMISS**.

APPEARANCES AT TRIAL

MATTHEW NEILL DAVIS
ATTORNEY AT LAW
202 WEST BROADWAY
ENID, OK 73701
ATTORNEY FOR DEFENDANT

BRYAN SLABOTSKY
ASSISTANT DISTRICT ATTORNEY
GARFIELD COUNTY COURTHOUSE
ENID, OK 73701
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

THOMAS PURCELL
APPELLATE DEFENSE COUNSEL
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
LORI S. CARTER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73104
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
CHAPEL, J.: CONCUR
STRUBHAR, J.: RECUSE
LILE, J.: CONCUR

RD

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART:

I concur in the affirmance of Count I, however, I dissent to the reversal with instructions to dismiss in Count II.

Appellant gave two explanations for his conduct – he was acting in self-defense and that the assault was accidental. The record shows sufficient evidence to warrant an instruction on self-defense, yet the trial court refused such an instruction. This was error. However, reversal of the conviction with instructions to dismiss the charges is not warranted. The testimony of the victim and the witnesses contradicted Appellant's testimony. The jury listened to the evidence and determined the credibility of the witnesses. To remand this case with instructions to dismiss places too much reliance on a *possible* verdict if the jury had been given instructions on self-defense. The case should be remanded for a new trial with proper instructions.