

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ERNEST LYNN,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2003-1136

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV - 9 2004

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION AND
ORDER REMANDING MATTER
FOR FURTHER CONSIDERATION

STRUBHAR, J.:

Ernest Lynn, Appellant, was tried in a bench trial in the District Court of Carter County, Case No. CF-2002-555, where he was acquitted of Feloniously Pointing a Firearm, but convicted of Possession of Firearms After Conviction of a Felony. The Honorable Lee A.Card, who presided at trial, sentenced Appellant to one year imprisonment. From this judgment and sentence, he appeals.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we remand this matter for further proceedings as dictated herein. In his brief, Lynn raised the following propositions of error for our consideration:

- I. Mr. Lynn was deprived of due process by the court's reliance on a charge never made and the court's refusal to recognize the defense of self-defense; and
- II. Because the warrantless search of the house was illegal, the gun should have been suppressed.

In Proposition I, Lynn argues the trial court convicted him on a factual basis not charged. After reviewing the record, we find there was no fatal variance. *Patterson v. State*, 45 P.3d 925, 931 (Okla.Cr.2002). The State charged Appellant with committing the crime of felonious possession “by knowingly having in his possession and within his immediate control a H & R .22 caliber pistol located in the hands of said defendant after he had been convicted of [a] felony” Lynn admitted he had the pistol in his hands and hit his brother with it. The trial court found, based in part on his admissions, that he had committed the crime charged. The trial court went on to note that Lynn had also made admissions during his testimony that supported a guilty verdict, albeit on an alternate theory. Because there was no variance, we find that no relief is warranted on this portion of his claim.

In Proposition II, Lynn contends his mother’s consent to search the house was not voluntary and the gun found during the warrantless search should have been suppressed. Lynn further contends that should this Court find this claim is waived due to trial counsel’s failure to litigate it properly, then this Court should find that he was denied effective assistance of trial counsel. We find that Lynn had no standing to contest the legality of the search. *Anderson v. State*, 992 P.2d 409, 417 (Okla.Cr.1999), *cert. denied*, 531 U.S. 850, 121 S.Ct. 124, 148 L.Ed.2d 79 (2000). Because he had no standing, he cannot prevail on his claim of ineffective assistance of counsel as he cannot prove prejudice. Therefore, we find this proposition is without merit .

Lynn also argues in Proposition I that the trial court did not consider his defense of self-defense and incorrectly treated felonious possession as a strict liability crime. Lynn concedes that a broad reading of this Court's holding in *Lancaster v. State*, 541 P.2d 1343, 1346 (Okla. Cr. 1975) supports the view that felonious possession is a strict liability crime. However, he argues that *Lancaster* should be narrowly read to hold that the defense of self-defense was not established by the facts of that case rather than that the defense is not available. Lynn asks this Court to adopt the justification defense used by Florida, where a convicted felon may temporarily take a firearm from an armed attacker if necessary to prevent death or great bodily harm. *Marrero v. State*, 516 So.2d 1052, 1056 (Fla. Dist. Ct. App. 1987). If the convicted felon retains possession of the firearm after the necessity ends and after he has sufficient time to reflect on the consequences of his possession, he will be guilty of felonious possession.¹ *Id.*

In *Lancaster*, this Court held that use of a firearm in one's own self-defense is not a defense to felon in possession. *Lancaster*, 541 P.2d at 1346. Contrary to Lynn's claim, the Court specifically held self-defense was not available as a defense, not that it was unsupported by the facts. However, we

¹The elements of the justification defense are: "(1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such danger; (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design, and (5) the defendant must give up possession of the handgun as soon as necessity or apparent necessity

find the justification defense advocated by Lynn persuasive and that allowing such a defense better fulfills the legislative intent of our statutes.

Our statutes specifically give persons under threat of injury the right to lawfully resist and use force to repel attackers. 21 O.S.2001, § 643; 22 O.S.2001, § 31. Nothing in 21 O.S.2001, § 1283, the statute prohibiting convicted felons from possessing firearms, indicates the Legislature intended to divest a convicted felon of his right to defend himself against the peril of death or serious bodily injury. This notion is further supported by the Legislature's specific Findings for similar legislation in the Oklahoma Firearms Act where it states:

The Legislature finds as a matter of public policy and fact that it is necessary for the safe and lawful use of firearms to curb and prevent crime wherein weapons are used by enacting legislation having the purpose of controlling the use of firearms, and of prevention of their use, **without unnecessarily denying their lawful use in defense of life**, home and property. . . .

21 O.S.2001, § 1289.2.

It seems only logical that a convicted felon should be allowed to disarm an armed attacker without risk of a conviction for felonious possession. It seems ludicrous to think that the Legislature intended that a convicted felon should succumb to an armed attacker and possibly forfeit his life rather than take possession of a firearm and act in self-defense. Adopting a justification defense would not thwart the general intent of the Legislature "to prevent

ends."

people of demonstrated irresponsibility from possessing instruments of death. . . .” *Renfro v. State*, 372 P.2d 45, 50 (Okl.Cr.1962). Rather, it would simply make a convicted felon’s possession of a weapon under exigent circumstances justified and the conduct declared not criminal under those specific circumstances. Accordingly, we hereby hold convicted felons can assert a justification defense to felonious possession and overrule *Lancaster* to the extent it is inconsistent with this opinion.

Were this a jury trial, we would be forced to reverse and remand this matter. However, because this was a bench trial, we remand this matter to the district court, who acted as the trier of fact, to allow the district court to make findings of fact and conclusions of law addressing whether Lynn met the justification defense adopted by this Court. A transcript of the hearing and the trial court’s findings of facts shall be due and filed in this Court within sixty (60) days from the date of this Order.

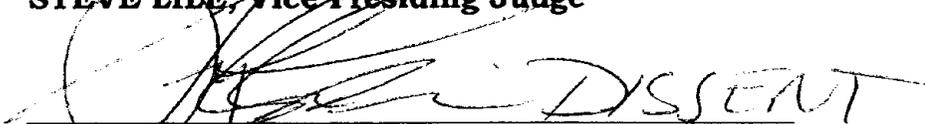
A supplemental brief, not exceeding ten (10) pages and addressing only the above issue may be filed by either party within fifteen (15) days after the trial court’s findings and conclusions are filed in this Court.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th day
of November, 2004.


CHARLES A. JOHNSON, Presiding Judge

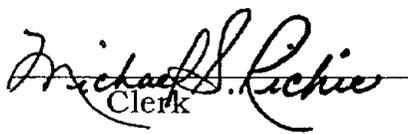

STEVE LIDE, Vice Presiding Judge


GARY L. LUMPKIN, Judge


CHARLES S. CHAPEL, Judge


RETA M. STRUBHAR, Judge

ATTEST:


Clerk