

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LAWRENCE LUGINEUS MAYES,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2005-737

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 26 2006

S U M M A R Y O P I N I O N

LEWIS, JUDGE:

MICHAEL S. RICHIE
CLERK

Lawrence Lugineus Mayes, Appellant, was tried by jury and found guilty of robbery with firearms, in violation of 21 O.S.2001, § 801, after former conviction of five (5) felonies, in the District Court of Oklahoma County, Case No. CF-2003-3169. The jury sentenced Appellant to forty-five (45) years imprisonment. The Honorable Tammy Bass-Jones, District Judge, imposed judgment and sentence accordingly. Mr. Mayes raises the following assignments of error on appeal:

1. The Trial Court Should Have Informed The Jury, After A Question Arose During The Second Stage Deliberations, That Robbery With Firearms Is An 85% Crime Under Okla. Stat. 21 § 13.1, Violating Mr. Mayes Right To Due Process Under The Federal And State Constitutions.
2. Under The Circumstances Of This Case A Forty-Five Year Sentence Is Excessive Under The Federal And State Constitutions.

In *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, this Court concluded that the 85% Rule, 21 O.S.Supp.2002, § 13.1, is a "specific and readily

understood concept of which the jury should be informed” when sentencing defendants for qualifying offenses. *Id.* at ¶ 25, 130 P.3d at 283. *Anderson* was decided after Appellant’s trial. Although *Anderson* stated that the failure to give such an instruction was not grounds for reversal in trials conducted before the opinion, *id.* at ¶ 25, 130 P.3d at 283, this Court has applied *Anderson* in cases pending on direct review at the time *Anderson* was decided to determine whether relief in the form of modification or re-sentencing was warranted. See *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987) (finding that failure to apply a new rule of criminal procedure to cases pending on direct review when the rule is announced violates a basic norm of adjudication; the nature of judicial review precludes us from “fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new [procedural] standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule”), quoting *United States v. Johnson*, 457 U.S. 537, 546-547, 555, 102 S.Ct. 2579, 2585, 2590, 73 L.Ed.2d 202 (1982). We do not automatically reverse a case for instructional error under *Anderson*, but rather determine whether the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. 20 O.S.2001, § 3001.1; *Ashinsky v. State*, 1989 OK CR 59, ¶ 20, 780 P.2d 201, 207.

During its sentencing deliberations, the jury asked the District Court, “With a 20 year sentence, how many years must be served before being eligible

for parole?” The District Court answered: “That is not an issue for you to consider.”

This Court was particularly concerned in *Anderson* that “jurors are likely to assume that defendants would become parole eligible at a much earlier point in time,” resulting in “unnecessary and unfair prejudice to the defendant—due to juries ‘rounding up’ their sentences, in an attempt to account for their uninformed guesses about the impact of parole.” *Anderson*, at ¶ 23, 130 P.3d at 282. The same concern is present here, where the jury imposed its forty-five year sentence after the District Court’s answer did not convey accurate information about the issue of parole eligibility. After carefully reviewing the facts of the case, the Court concludes that the proper remedy here is modification of the sentence to thirty-five (35) years imprisonment. *Scott v. State*, 1991 OK CR 31, ¶¶ 14, 17, 808 P.2d 73, 77-78.

Appellant’s second proposition requires no relief.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **MODIFIED** to thirty-five (35) years imprisonment, and otherwise **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

APPEARANCES AT TRIAL

TRACI RHONE
ASSISTANT PUBLIC DEFENDER
320 ROBERT S. KERR, ROOM 611
OKLAHOMA CITY, OK 73102,
ATTORNEYS FOR DEFENDANT

ROBERT SCHWARTZ
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, ROOM 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

ANDREA DIGIGLIO MILLER
ASSISTANT PUBLIC DEFENDER
320 ROBERT S. KERR, ROOM 611
OKLAHOMA CITY, OK 73102,
ATTORNEYS FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
HEATH ROBINSON
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY LEWIS, J.

CHAPEL, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Results
A. JOHNSON, J.: Concur
C. JOHNSON, J.: Concur