

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

DAVID JEWEL NEWTON,)
)
Appellant,)
)
-vs-)
)
STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION
No. F-2002-1546

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN - 9 2004

SUMMARY OPINION MICHAEL S. RICHIE
CLERK

STRUBHAR, J.:

David Jewel Newton, Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-2001-5568, and was convicted of First Degree Rape, After Former Conviction of Two or More Felonies. The jury recommended four hundred fifty-eight (458) years imprisonment and the Honorable Deirdre O. Dexter, who presided at trial, sentenced Appellant accordingly. From this judgment and sentence, he appeals.

Appellant raised the following propositions of error for consideration:

- I. Mr. Newton was denied a fair trial before an unbiased jury by (1) defense counsel's ineffectiveness in failing to challenge for cause or to remove biased jurors by peremptory challenge and (2) the trial court's plain error in allowing biased jurors to remain on the jury;
- II. Mr. Newton was prejudiced by the ineffective assistance of counsel; and
- III. Mr. Newton's sentence is excessive and should be modified.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we reverse and remand this case for a new trial. We find merit to the claim raised

in Proposition I. We agree that Prospective Juror Harrison, who was an active Tulsa police officer, was statutorily disqualified to serve on a jury, *see Warner v. State*, 29 P.3d 569, 572 n.5 (Okl.Cr.2001); *Fennell v. State*, 396 P.2d 889, 891 (Okl.Cr.1964); 38 O.S.2001, § 28(B)(4). Inexplicably defense counsel chose to remove Harrison with a peremptory challenge and made no effort to challenge Harrison or any other juror for cause, despite obvious reasons to do so. Consequently, we find the trial court erred in failing to remove Harrison for cause based on 38 O.S.2001, § 28 (B)(4), but more importantly that defense counsel was deficient in failing to challenge Harrison for cause. We are satisfied that this record supports a finding that Appellant was prejudiced by counsel's failure to challenge Harrison for cause and by his use of a peremptory to remove him as there is strong evidence to suggest a seated juror was unfit to serve and counsel failed to take the necessary steps to ensure the selection of a fair and impartial jury. Consequently, relief is required. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

DECISION

The Judgment and Sentence of the trial court is **REVERSED** and the case **REMANDED** for a new trial.

APPEARANCES AT TRIAL

DONALD FLASCH
ATTORNEY AT LAW
6520 S. LEWIS, STE. 10
TULSA, OK 74136-1041
ATTORNEY FOR APPELLANT

RUSSELL ANDERSON
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
406 COURTHOUSE
TULSA, OK 74103
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

S. GAIL GUNNING
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL
OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
2300 N.LINCOLN BLVD., SUITE112
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: STRUBHAR, J.

JOHNSON, P.J.: CONCUR
LILE, V.P.J.: DISSENT
LUMPKIN, J.: DISSENT
CHAPEL, J.: CONCUR

RA

LILE, VICE-PRESIDING JUDGE: DISSENT

The Court today writes law that the legislature has repeatedly declined to write. The Court disqualifies law enforcement officers from jury service. The legislature has never been willing to write such a broad prohibition. The legislature has prohibited sheriffs and deputy sheriffs from service on either civil or criminal juries. One court characterized that exclusion as proper because sheriffs collect fees at various stages of both civil and criminal cases and "it was manifestly unfair for a sheriff to be a juror, and thereby enabled to aid in securing a judgment from which he would possibly benefit." *Robinson v. Oklahoma*, (1906) 148 F 830. Likewise, the legislative prohibition upon jailers and persons having custody of prisoners seems appropriate since those persons might benefit from the ultimate verdict, at least in a criminal case.

This broad and arguably unconstitutional prohibition written by the Court today presumes that all law enforcement officers will be prejudiced against any defendant.

Having written a new law, the Court must next ignore a properly enacted one to reach its objective today.

Title 38 § 29 provides that a verdict rendered by a jury should not be set aside unless the error "resulted in depriving a party litigant of some substantial right; . . ."

The law enforcement officer involved in this case was excused by the defendant by peremptory challenge. HE DID NOT SIT ON THE JURY!

There were no jurors on the jury that ultimately decided the case that were subject to removal for cause. Peremptory challenges are a statutory means of achieving an impartial jury, but loss of a peremptory challenge is not of constitutional magnitude. The proper inquiry in such cases is to focus on the jurors who ultimately sat on the jury. They must be impartial. *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed 2d 80; *Myers v. State*, 2000 OK CR 25, 17 P.3d 1021; *Abshier v. State*, 2001 OK CR 13, 28 P.3d 579; *Frederick v. State*, 2001 OK CR 34, 37 P.3d 908.

Simply put, there is no reason to order a new trial in this case. Appellant was denied no right and suffered no prejudice.

LUMPKIN, JUDGE: DISSENTING

I join with Vice Presiding Judge Lile in his well-written dissent. As I have previously stated in *Warner v. State*, 29 P.3d 569, 576 ¶3 (Okl.Cr.2001),

The language of 38 O.S.1991, § 28(B), is specific and clear. When subpart 3 is read in conjunction with subpart 4, it reveals the Legislature was unequivocal in providing that 'sheriffs or deputy sheriffs' are not qualified to serve as jurors. 38 O.S.1991, § 28(B)(3). However, subpart 4 contains a qualifier which provides that 'jailers or law enforcement officers, state or federal, having custody of prisoners' are not qualified to serve as jurors. 38 O.S.1991, § 28(B)(4). If the Legislature had intended all law enforcement officers to be disqualified to serve as jurors, they would have specifically said so as they did in relation to sheriffs or deputy sheriffs. However, as to other law enforcement officers or jailers, the qualification is limited to 'having custody of prisoners'.

As in *Warner*, there is no evidence Prospective Juror Harrison was a law enforcement officer "having custody of prisoners". Therefore, he was not subject to removal for cause and there is no error. As Judge Lile points out, the jurors who served on this jury were qualified and impartial. There is no basis for reversal of this case.