

SEP 11 2002

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
NANCY S. PARROTT
CLERK

JOSEPH EDWARD PEYTON,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. F-2001-122
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

LILE, JUDGE:

Appellant, Joseph Edward Peyton, was convicted at jury trial of five counts of Robbery With Firearms in violation of 21 O.S.1991, § 801 in violation of 21 O.S.1991, § 801, in Case No. CF-2000-2693, in the District Court of Tulsa County. The Honorable J. Michael Gasset, District Judge, sentenced Appellant in accordance with the jury's verdict to ten (10) years imprisonment on Counts I and III, and five (5) years imprisonment on Counts II, IV, and V, and ordered the sentences to run consecutively. Appellant has perfected his appeal to this Court.

Appellant raises three propositions of error in support of his appeal:

- I. MR. PEYTON'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED.
- II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. PEYTON'S CONVICTIONS IN COUNTS TWO, FOUR AND FIVE.
- III. SENTENCE IS EXCESSIVE AND SHOULD BE MODIFIED.

After a thorough consideration of these propositions and the entire record before us on appeal, including the original record, available transcripts, and briefs of the parties, we find that reversal on Counts II, IV, and V is required by the facts and the evidence.

In Proposition I, We find under the “totality of the circumstances” that Appellant was not in police custody when he made his admission. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); *Bryan v. State*, 1997 OK CR 15, 935 P.2d 338; *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Dennis v. State*, 1999 OK CR 23, 990 P.2d 277. Therefore, the questioning did not require that Miranda warnings be given and the statements are admissible. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1996); *McGregor v. State*, 1994 OK CR 71, 885 P.2d 1366. This proposition is denied.

Concerning Proposition II, mere presence at the scene of the crime does not invoke criminal responsibility. *Hindman v. State*, 1982 OK CR 98, 647 P.2d 456. To prove aiding and abetting, the State must show “acts, words or gestures encouraging the commission of the offense, either before or at the time of the commission of the offense.” *Frazier v. State*, 1981 OK CR 13, 624 P.2d 84. The State relied upon Appellant’s statement without any additional evidence of his participation. That statement alone does not establish guilt of these counts. This proposition is granted, and Counts II, IV, and V are reversed.

As for Proposition III, the sentence does not shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, 34 P.3d 148.

DECISION

The judgment and sentence of the trial court is **AFFIRMED** on Counts I and III. The judgment and sentence of the trial court on Counts II, IV, and V is **REVERSED** and **DISMISSED**.

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OPINION BY: LILE, J.

LUMPKIN, P.J.: CONCURS
JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS IN RESULTS

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