

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEANDRE LEE SANDERS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-597

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL - 6 2006

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

C. JOHNSON, JUDGE:

Appellant, Keandre Lee Sanders, was convicted after jury trial in Tulsa County District Court, Case No. CF-2005-207, of Count 1: Robbery with a Firearm (21 O.S.2001, § 801), After Conviction of a Felony; Count 2: Shooting with Intent to Kill (21 O.S.2001, § 652(A)), After Conviction of a Felony; and Count 3: Possession of a Firearm, After Conviction of a Felony (21 O.S.Supp.2002, § 1283). The jury recommended punishment of fifteen years imprisonment on Count 1, forty years imprisonment on Count 2, and five years imprisonment on Count 3. On June 13, 2005, the Honorable Thomas C. Gillert, District Judge, sentenced Appellant in accordance with the jury's recommendation, ordering all sentences to be served consecutively. Appellant then timely filed this appeal.

Appellant raises the following propositions of error:

1. The trial court erred in failing to grant Appellant a continuance to investigate newly acquired exculpatory evidence; alternatively, trial counsel rendered ineffective assistance in failing to exercise due diligence and/or failing to properly seek a continuance.
2. The trial court erred in refusing to merge Count 3 with either Count 1 or Count 2.
3. The trial court's failure to instruct on parole ineligibility was error.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the judgments, but modify the sentences on Counts 1 and 2.

As to Proposition 1, on the day of trial, defense counsel requested a continuance to try to locate a witness and determine whether he wrote a potentially exculpatory letter which counsel received just days before. The record shows that the State itself had subpoenaed this witness but was unable to locate him. Defense counsel told the court she had located the witness's mother, who refused to assist. The trial court found no reason to believe that delaying the trial would make the witness any more likely to surface or cooperate. Indeed, appellate counsel has had ample time since the trial to locate the witness and obtain any exculpatory information he might have, yet no such information is included in Appellant's request for an evidentiary hearing on his ineffective-counsel claim. We review the trial court's denial of a continuance for an abuse of discretion, and find none. *Shelton v. State*, 1990 OK CR 34, ¶ 28, 793 P.2d 866, 876 ("Abuse of discretion will not be found where an appellant does not indicate how he was prejudiced by denial of the motion [for continuance]"); *Irvin v. State*, 1980 OK CR 70, ¶ 8, 617 P.2d 588, 592. Furthermore, Appellant has failed to demonstrate a strong possibility that that trial counsel's efforts to investigate this matter, and present it to the trial court in a timely and effective manner, were deficient in any way. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Duckett v. State*, 1995 OK CR 61, ¶ 12, 919 P.2d 7, 14; Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2005). Appellant's request for an evidentiary hearing on his ineffective-counsel claim is denied, and Proposition 1 is denied.

As to Proposition 2, Appellant, a convicted felon, committed a crime by possessing a firearm before he ever targeted and approached his victim. Under these facts, the act of possessing a firearm after conviction of a felony was not the "same act" as either the armed robbery or the shooting for double-punishment purposes. 21 O.S.2001, § 11; *Davis v. State*, 1999 OK CR 48, ¶¶ 6-8, 993 P.2d 124, 125-26; *Campbell v. State*, 1987 OK CR 16, ¶ 3, 732 P.2d 6, 7. Proposition 2 is denied.

As to Proposition 3, Appellant timely requested a jury instruction that if convicted, he would be required by law to serve at least 85% of any sentence on Counts 1 and 2 without possibility of parole. While Appellant's appeal was pending, we found such a request to be proper. *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273. Appellant requests either sentence modification or reversal, and we find that the sentence on Count 1 should be **MODIFIED** to twelve years, and the sentence on Count 2 should be **MODIFIED** to thirty years. The sentence on Count 3 is not affected.

DECISION

The Judgment of the district court is **AFFIRMED**. The sentence on Count 1 is **MODIFIED** from fifteen years to twelve years imprisonment, and the sentence on Count 2 is **MODIFIED** from forty years to thirty years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma 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 TULSA COUNTY
THE HONORABLE THOMAS C. GILLERT, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY C. JOHNSON, J.

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

RB

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LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULTS

In concur in the affirmance of the convictions finding no error warranting reversal. Based solely upon the principle of *stare decisis* I accede to the application of *Anderson* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson* which states:

While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, **it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal.** *Id.*

2006 OK CR 6, ¶ 25 (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner.