

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

ROBERT EUGENE SCHWAB,)	
)	NOT FOR PUBLICATION
Appellant,)	
vs.)	No. M-2007-192
)	
STATE OF OKLAHOMA,)	
)	
Appellee.)	

FILED
IN COURT OF CRIMINAL APPEAL
STATE OF OKLAHOMA
JAN 14 2008
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant, Robert Eugene Schwab, was tried by a jury in the District Court of Creek County, Case No. D-CF-2003-129 and found guilty of three counts of Threatening by Telephone or Other Electronic Communication in violation of 21 O.S.Supp.2005, § 1172. The jury fixed punishment at 6 days in the Creek County jail and fined Appellant \$570 for each count. The Honorable M. John Kane, IV, District Judge, sentenced Appellant accordingly. From this judgment and sentence, Appellant appeals.

This case raises the issue whether Appellant's conviction is an *ex post facto* violation requiring dismissal. We find, pursuant to the State's confession of error filed December 4, 2007, that Appellant's convictions should be reversed with instructions to dismiss.

As noted by Appellant, he was charged with three counts of Transmitting a Threatening Letter in violation of 21 O.S. § 1304. His preliminary hearing was conducted on April 15, 2004 and he was bound over for trial. At trial, the jury

refused to convict Appellant of the charged offense, instead finding him guilty of the lesser included offense of Threats or Harassment by Telephone or Other Electronic Communication. As noted by Appellant and confessed by the State, however, the crime Appellant was convicted of was not a crime at the time Appellant composed and transmitted the e-mail that was the subject of the charges. *Barnes v. State*, 1990 OK CR 23, ¶¶ 3-4, 791 P.2d 101, 102-103.

DECISION

The Judgment and Sentence is **REVERSED**. This matter is **REMANDED** to the District Court of Creek County with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE M. JOHN KANE, IV, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: A. JOHNSON, JUDGE

LUMPKIN, P.J.: Concur in results

C. JOHNSON, V.P.J.: Concur

CHAPEL, J.: Concur

LEWIS, J.: Concur

RD