

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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|------------------------|---|---------------------|
| ROY C. WILLIAMS, |) | NOT FOR PUBLICATION |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case No. F-2010-665 |
| |) | |
| THE STATE OF OKLAHOMA, |) | |
| |) | |
| Appellee. |) | |

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 APR - 4 2012

SUMMARY OPINION

C. JOHNSON, JUDGE:

MICHAEL S. RICHIE
 CLERK

Appellant, Roy C. Williams, was convicted by a jury in Tulsa County District Court, Case No. CF-2008-3616, of one count of Second Degree Felony Murder (21 O.S.2011, § 701.8) (Count 1) and two counts of Using a Vehicle to Facilitate the Discharge of a Firearm (21 O.S.Supp.2007, § 652(B)) (Counts 2 and 3). On July 6, 2010, the Honorable Kurt G. Glassco, District Judge, sentenced Williams in accordance with the jury's recommendation to twelve years imprisonment on Count 1, and three years imprisonment each on Counts 2 and 3, with the sentences to be served consecutively.¹ This appeal followed.²

Appellant raises the following propositions of error:

1. Appellant's statement to police was introduced in violation of his constitutional rights to silence.
2. The evidence is insufficient to support Appellant's convictions.

¹ Appellant is required to serve at least 85% of his sentences before being eligible for parole. 21 O.S. § 13.1(2), (5).

² Williams was tried jointly with co-defendant Marco Carroll. The jury found Carroll guilty on the same three charges, and recommended punishment of twenty years for Count 1, five years on Counts 2, and six years on Count 3. Carroll's appeal is before the Court in Case No. F-2010-495.

3. Appellant's conviction for Second-Degree Murder must be vacated pursuant to the merger doctrine.
4. Appellant's convictions for both Second-Degree Murder and Using a Vehicle to Facilitate the Discharge of a Weapon (Count 2) violate his constitutional protection from double jeopardy.
5. The trial court abused its discretion in refusing to grant Appellant credit for time served in the county jail while awaiting trial.
6. Appellant was denied the effective assistance of counsel.
7. The cumulative effect of all errors addressed above denied Appellant a fair trial.

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 Appellant's convictions on Counts 1 and 3, but reverse Count 2 on double-jeopardy grounds.

Appellant accompanied three other men in a drive-by shooting incident, which resulted in the death of one person and injury to another. The evidence showed that three firearms were in the vehicle, shots were fired from more than one gun, and that Appellant was the driver of the vehicle.

As to Proposition 1, the evidence presented at the pretrial suppression hearing was sufficient for the trial court, considering the totality of the circumstances, to conclude that Appellant's incriminating statements to police were freely and voluntarily made. *Davis v. State*, 2004 OK CR 36, ¶¶ 32-37, 103 P.3d 70, 80-81. Proposition 1 is therefore denied.

As to Proposition 2, Appellant's act of driving his associates to the neighborhood of a rival gang member, in a vehicle full of loaded firearms, was

sufficient for a rational juror to conclude, beyond a reasonable doubt, that he knowingly participated in using a vehicle to facilitate the intentional discharge of a firearm, which was the proximate cause of one victim's death (Count 1) and another's injury (Count 3). *Douglas v. State*, 1997 OK CR 79, ¶¶ 65-67, 951 P.2d 651, 672. Proposition 2 is denied.

As to Proposition 3, we recently abrogated the judicially-created "merger doctrine," and concluded that the crime of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm could, in fact, serve as a predicate for Second Degree Felony Murder, consistent with the plain language of statute. *Barnett v. State*, 2011 OK CR 28, 263 P.3d 959, *rehearing granted*, 2012 OK CR 2, — P.3d —. For the reasons given in *Barnett*, we find that the "merger doctrine" does not require reversal of Appellant's Second Degree Murder conviction.³ Proposition 3 is denied.

As to Proposition 4, Appellant's conviction in Count 1 (Second Degree Murder, in the commission of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm) necessarily depended on the same facts used to support the conviction in Count 2 (Using a Vehicle to Facilitate the Intentional Discharge of a Firearm). Multiple convictions based on the same set of facts violate constitutional protections from double jeopardy.⁴ *Perry v. State*, 1993

³ We also held that application of this change to cases pending on direct appeal at the time did not implicate *ex post facto* concerns. *Barnett*, 2012 OK CR 2 at ¶¶ 13-17 (on rehearing).

⁴ The State claims that separate convictions are maintainable because there were two people in the vehicle targeted in the first shooting incident, although only one was hit. However, the State never argued this theory at trial, and the court never instructed the jury on it. Rather, the State's theory at trial was that Count 2 should go to the jury separately as a "backup," in the event that the jury rejected the felony-murder theory in Count 1.

OK CR 5, ¶ 7, 853 P.2d 198, 200-01. Therefore, Appellant's conviction in Count 2 is **REVERSED WITH INSTRUCTIONS TO DISMISS**.

As to Proposition 5, whether a trial court grants a convicted defendant credit for time served in the county jail is a matter within the court's discretion, and this Court will presume that the trial court exercised its discretion properly in the absence of contrary evidence. *Holloway v. State*, 2008 OK CR 14, ¶ 8, 182 P.3d 845, 847; *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 534-35. We find no constitutional or statutory authority for a trial court to give a defendant credit for time served in the county jail pending trial, and therefore question whether a court's refusal to give such credit is even reviewable on appeal. *See Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602. In any event, the record shows that the trial court did not have a "blanket" policy of denying credit for time served pending trial, as it did, in fact, give Appellant partial credit for time served. No relief is warranted, and Proposition 5 is denied.

As to Proposition 6, when this Court denied relief in Proposition 3, regarding the merger doctrine, it did so on the merits, not on grounds that the issue was waived by failure to raise it below. Trial counsel's failure to raise the issue had no effect on the ultimate outcome. *Hancock v. State*, 2007 OK CR 9, ¶ 109, 155 P.3d 796, 822. Our decision to reverse Count 2 on double jeopardy grounds renders moot Appellant's claim that trial counsel was deficient for failing to press this issue below. *Pickens v. State*, 2007 OK CR 18, ¶ 3, 158 P.3d 482, 483. Finally, Appellant claims trial counsel was deficient for failing

to present additional evidence to corroborate his mother's testimony at the pretrial hearing on the voluntariness of his statements to police. The only evidence Appellant can point to is his own affidavit and school records, which have been submitted to the Court in an Application for Evidentiary Hearing, consistent with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2011). These materials do not provide clear and convincing evidence suggesting a strong possibility that trial counsel was deficient. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-906. Appellant's Application for Evidentiary Hearing on his ineffective-counsel claims is **DENIED**. Proposition 6 is denied.

As to Proposition 7, having found only one error, and having remedied that error by vacating Appellant's conviction on Count 2, we find no additional error requiring relief. *Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627. Proposition 7 is denied.

DECISION

Count 2 is **REVERSED WITH INSTRUCTIONS TO DISMISS**. In all other respects, the Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

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OPINION BY C. JOHNSON, J.

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