

MAR 28 2006

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

**MICHAEL S. RICHIE  
CLERK**

CHARLES EDWARD MOORE, JR.,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-2004-1081

**S U M M A R Y O P I N I O N**

**LEWIS, JUDGE:**

Charles Edward Moore, Jr., Appellant, was tried by jury and found guilty of robbery with firearms, in violation of 21 O.S. 2001 § 801 (Counts 1 and 2); kidnapping, in violation of 21 O.S. 2001 § 741 (Counts 3 and 4); and possession of a firearm after former conviction of a felony, in violation of 21 O.S.Supp. 2002 § 1283 (Count 5), in Tulsa County District Court, Case No. CF-2003-4875. Appellant was represented by counsel. At the conclusion of the first stage of trial, the jury sentenced Appellant to fourteen (14) years imprisonment on each Count of robbery with firearms, and ten (10) years imprisonment on each Count of kidnapping. After bifurcation, the jury sentenced Appellant to ten (10) years imprisonment for possession of a firearm after former conviction of a felony. The Honorable Rebecca Brett Nightingale, District Judge, imposed judgment and sentence according to the jury verdicts, and ordered all terms served consecutively.

Mr. Moore appeals, raising the following propositions of error:

1. Convictions For Two Counts Of Robbery With A Firearm Upon Theft Of The Same Truck Violated The Proscription Against Double Punishment.
2. Section 11 Precluded Convictions For Both Robbery With A Firearm And Possession Of A Firearm AFCF.
3. Failure To Instruct On Parole Ineligibility Was Error.
4. Appellant Was Deprived Of Effective Representation.
5. Admission Of Prejudicial Other Crimes Evidence Deprived Mr. Moore Of The Due Process Right To A Fair Trial.
6. Cumulative Error Requires Reversal.

In Proposition 1, the Court finds Appellant's two convictions for robbery neither subject him to multiple punishments in violation of 21 O.S. 2001 § 11 nor place Appellant twice in jeopardy for the same offense, as prohibited by Article 2, § 21 of the Oklahoma Constitution and the Fifth and Fourteenth Amendments to United States Constitution. *Davis v. State*, 1999 OK CR 48, 993 P.2d 124; *Orcutt v. State*, 1931 OK CR, 52 Okl.Cr. 217, 3 P.2d 912 (1931); *Mansfield v. Champion*, 992 F.2d 1098 (10<sup>th</sup> Cir. 1993).

In Proposition 2, the Court finds that under the specific circumstances presented Appellant's convictions for possession of a firearm after former felony conviction and robbery with firearms violate 21 O.S. 2001 § 11. Appellant's conviction in Count 5 is reversed and remanded with instructions to dismiss. *Davis v. State*, 1999 OK CR 48 ¶ 13, 993 P.2d 124.

In Proposition 3, the Court finds error in the District Court's refusal to give Appellant's requested instruction on parole eligibility. The remedy in this case is to modify Appellant's two fourteen-year sentences for robbery with firearms to ten years imprisonment on each count. The District Court's order that all sentences run consecutively is within its discretion and will not be disturbed on appeal. *Anderson v. State*, 2006 OK CR 6, \_\_\_ P.3d \_\_\_.

In Proposition 4, Appellant challenges his convictions based on ineffective assistance of counsel. The Court finds Appellant cannot show that but for counsel's allegedly deficient performance, there is any reasonable probability of a different outcome at trial. No relief is required. *Davis v. State*, 1999 OK CR 16, ¶ 38, 980 P.2d 1111, 1120. Appellant's related Proposition 5, challenging the trial court's admission of evidence of other crimes, wrongs, or bad acts, is also denied. 12 O.S. 2001 § 2404. *Jones v. State*, 2006 OK CR 5 ¶ 48, \_\_\_ P.3d \_\_\_.

Appellant's Proposition 6, arguing for reversal or modification due to cumulative error, is without merit.

### **DECISION**

The Judgment of the District Court of Tulsa County in Counts 1 through 4 is **AFFIRMED**. The Sentences in Counts 1 and 2 are **MODIFIED** to ten years imprisonment on each count. The Sentences in Counts 3 and 4 are **AFFIRMED**. The Judgment and Sentence in Count 5 is **REVERSED** and **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, Rules of the 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 REBECCA BRETT NIGHTINGALE, DISTRICT JUDGE

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OPINION BY LEWIS, J.  
CHAPEL, P.J.: **CONCURS**  
LUMPKIN, V.P.J.: **CONCURS IN RESULTS**  
A. JOHNSON, J.: **CONCURS IN RESULTS**  
C. JOHNSON, J.: **CONCURS**

**LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULTS**

I concur in results based on *stare decisis* and accede to the majority's decision to apply *Anderson v. State* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson v. State*, 2006 OK CR, ¶ 25, \_\_\_ P.3d \_\_\_, 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.** (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. Therefore, based on the plain language of *Anderson*, I would affirm both the judgment and sentence but submit to the will of the majority in this case.