IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHERMAN NATHANIEL BROWN,	)	**NOT FOR PUBLICATION**
	)	
Appellant,	)	
v.	)	Case No. F-99-607
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

JOHNSON, J.:

Sherman Nathaniel Brown, Appellant, was charged by Information in Okmulgee County District Court (Case No. CRF-98-51) with two counts of Murder in the First Degree, and two counts of Robbery with a Dangerous Weapon. The State filed a Bill of Particulars alleging two aggravating circumstances as to both murders: 1) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and 2) the existence of a probability that defendant would commit criminal acts of violence, constituting a continuing threat to society. Appellant was represented by counsel, in a jury trial, with the Honorable John Maley, District Judge, presiding. The jury found Appellant guilty on all counts. Finding the "continuing threat" aggravating circumstance applicable to both murder counts, but rejecting the "avoid arrest" aggravating circumstance, the jury recommended punishment of life on the robbery charges and life without possibility of parole on the murder charges. The trial court sentenced

Appellant in accordance with the jury's recommendation. From these Judgments and Sentences Appellant has perfected this appeal.

Appellant worked with Ms. Tash at the EZ Mart convenience store in Preston, Oklahoma. State witnesses Ron Orsburn and Robert Miller were in the store at approximately 6:00 a.m. on February 21, 1998, near the end of Appellant's shift. They testified that Ms. Tash was also at the store that morning, and when they exited the store, she and Appellant were the only two in the store. Approximately thirty minutes after the men left, State witness Jim Vogt discovered the body of Ms. Tash in the ladies restroom. She had been shot several times in the head. It was later determined that $1,400 in cash and $2,200[1] in inventory was missing from the store.

On February 24, 1998, three days later, a second robbery occurred at Harvey's Phillips 66. The owner of the station, Mr. William Harvey, was shot several times in the head and was dead prior to the arrival of emergency personnel. Approximately $140.00 was taken from the station. State witness Lester Best testified that he drove through the parking lot at approximately 6:00 p.m. and saw Appellant follow Mr. Harvey into the station. Johnny Larue, owner of an automotive repair shop near the station, testified that he saw a small-built black man, driving a dark-gray pickup, exit the station around the

[1] The missing inventory was explained by State's witnesses Eugene Varnes, Ben Mondragon, Lisa Fletcher and Angel Martin. All four witnesses had been in the EZ Mart during Mr. Brown's shift on the night of the 21st, and had been allowed to take merchandise from the store without paying. According to the witnesses, Mr. Brown was unhappy about his paycheck, therefore, was not charging for the merchandise.

time Mr. Harvey was shot. Other facts will be revealed as they become relevant to the specific proposition of error.

Appellant raises three propositions of error, only two of which we deem necessary to discuss as this case must be reversed and remanded for separate trials. In his second proposition of error, Appellant claims that the trial court's refusal to sever the charges deprived him of his Due Process rights. First, Appellant complains that the joinder of the Tash robbery/homicide and the Harvey robbery/homicide in a single trial violated 22 O.S.1991, §§ 404[2] and/or 436.[3]

Prior to trial, defense counsel filed a Motion for Severance. Counsel argued, in both the motion and the hearing on the motion, that joinder was improper because the offenses did not arise from the same series of acts or transactions. Appellant contends the trial court's reason for denying his Motion

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[2] § 404. Single offense to be charged - Different counts.

The indictment or information must charge but one offense, but where the same acts may constitute different offenses, or the proof may be uncertain as to which of two or more offenses the accused may be guilty of, the different offenses may be set forth in separate counts in the same indictment or information and the accused may be convicted of either offense, and the court or jury trying the cause may find all or either of the persons guilty of either of the offenses charged, and the same offense may be set forth in different forms or degrees under different counts; and where the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count.

[3] Title 22 O.S.1991, § 435 provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, provided that all of the defendants charged together in the same indictment or information are alleged to have participated in all of the same acts or transactions charged.

for Severance was upon the belief that § 404 was repealed by the enactment of §§ 436-440[4].

Appellant's argument is two-fold. First, he argues that § 404 rather than § 436 is the controlling statutory authority in his case. Second, he argues that even if § 436 is the controlling authority, joinder was impermissible because the charges did not arise from the same series of acts or transactions.

In interpreting the phrase "series of acts or transaction," this Court explained as follows:

> We have never had occasion to interpret the phrase "series of criminal acts or transactions" in this context. In so construing the statute, we are obligated to employ the common and ordinary meaning of the statutory term. The American College Dictionary defines "series" as a "number of things, events, etc., arranged of occurring in spatial, temporal, or other succession; a sequence." Accordingly, joinder of offenses is proper where the counts so joined refer to the same type of offenses occurring over a relatively short period of time, in approximately the same location, and proof as to each transaction overlaps so as to evidence a common scheme or plan.

Glass v. State,1985 OK CR 65, ¶9, 701 P.2d 765, 768.

In applying *Glass* to the facts of this case, we find the trial court abused its discretion in denying Appellant's motion for severance of offenses. Assuming *arguendo* the joined offenses refer to the same type of offenses occurring over a relatively short period of time in approximately the same

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[4] *Allison v. State*, 1983 OK CR 169, 675 P.2d 142, 146 (holding §404 was repealed by implication by the enactment of §§ 436-440) and *State v. Lowe*, 1981 OK CR 26, 627 P.2d 442, 443 (denying re-examination of *Dodson v. State*, 1977 OK CR 140, 562 P.2d 916 [Brett, J., specially concurring] and holding § 404 was repealed by implication by §§ 436-440).

location, proof as to each offense do not overlap so as to evidence a common scheme or plan. In speaking of a common scheme or plan, this Court in *Atnip v. State*, 1977 OK CR 187, 564 P.2d 660, 663 said:

> A common scheme or plan contemplates some relationship or connection between the crimes in question. The word, "common" implies that although there may be various crimes, all said crimes must come under one plan or scheme whereby the facts of one crime tend to establish the other such as where the commission of one crime depends upon or facilitates the commission of the other crime, or where each crime is merely a part of a greater overall plan. In such event, the crimes become connected or related transactions, and proof of one becomes relevant in proving the other. (citations omitted.)

Here, there is nothing to indicate that the Tash robbery/homicide and the Harvey robbery/homicide were connected in any manner. In fact, the State argued throughout trial that Appellant's motive for the Tash robbery/homicide was a result of his anger over the repeated tardiness of his paychecks. There was no suggestion that the Tash robbery/homicide depended upon or facilitated the Harvey robbery/homicide. Accordingly, the judgments and sentences are **REVERSED** and this case is **REMANDED** for **SEPARATE TRIALS**.

In as much as resolution of Appellant's first proposition of error is necessary for the retrials, we address that claim. Appellant claims that his

rights under the Fourth Amendment and 22 O.S.Supp.1998, §§ 1223 and 1230[5] were violated by the admission of evidence obtained through the illegal search of his home. Appellant specifically complains that no probable cause existed upon which to issue a warrant, and even if probable cause did exist, there were no exigent circumstances to justify the nighttime execution of the warrant.

At the hearing to suppress the evidence of the search, the Honorable Charles Humphrey, District Judge, found that the search warrant issued by the Honorable John Maley, District Judge, contained legally sufficient facts to establish probable cause for issuing the warrant, but found no exigent circumstances to warrant its nighttime execution. Judge Humphrey concluded that the warrant had been served sometime between 5:50 a.m. and 6:05 a.m. and that there was no evidence showing that the intrusion of Appellant's residence at 5:50 a.m. would be any less abrasive than a search occurring ten

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[5] Section 1230 provides:

§ 1230. Search warrant may be served, when.

Search warrants for occupied dwellings shall be served between the hours of six o'clock a.m. and ten o'clock p.m., inclusive, unless the judge finds the existence of at least one of the following circumstances:

1. The evidence is located on the premises only between the hours of ten o'clock p.m. and six o'clock a.m.;
2. The search to be performed is a crime scene search; or
3. The affidavits be positive that the property is on the person, or in the place to be searched and the judge finds that there is likelihood that the property named in the search warrant will be destroyed, moved or concealed.

If **any** of the above criteria are met, the issuing magistrate may insert a direction that the warrant be served at any time day or night. Search warrants for sites other than occupied dwellings may be served at any time of the day or night without special direction.

minutes later. Thus, he found that any violation would be "*de minimus*" and therefore harmless.

In *Moore v. State*, 1990 OK CR 5,¶27, 788 P.2d 387, 395, this Court held:

> A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' ...'Courts should not invalidate warrant[s] by interpreting affidavit[s] in hyper-technical, rather than a commonsense manner.' 'So long as the magistrate had a substantial basis for ...concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more' (*citing Illinois v. Gates*, 462 U.S. 213,236,103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983)).

Here, a review of the affidavit supporting the search warrant and the search warrant reveals that the issuing magistrate was provided with more than sufficient evidence to authorize nighttime service and execution of the warrant. First, two people had been murdered in this small community within the span of just three days and one murder had just occurred less than 12 hours before the warrant was sought. Further, the facts and circumstances positively identified Appellant as the most likely suspect in the killings. *Id.* The issuing magistrate correctly asserted that "blood, hairs, fibers, fingerprints, other microscopic and physical evidence...[was] perishable evidence associated with the crime" (*Id.* at 2) and there existed a substantial possibility that the evidence would be destroyed, moved or concealed. Thus, we disagree with Judge Humphrey's finding that there existed no exigent circumstances to justify a nighttime execution of the warrant. Accordingly, Appellant's arguments

regarding the validity of the warrant and search are without merit and this proposition is denied.

Decision

Judgments and Sentences are **REVERSED** and this case is **REMANDED** for **SEPARATE TRIALS.**

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE JOHN MALEY, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS IN RESULT
LILE, J.: CONCURS

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LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I dissent to the opinion insofar as it reverses Appellant's convictions and remands the case for a new trial based upon the allegation that the Tash robbery/homicide and the Harvey robbery/homicide were improperly joined in a single trial. In my opinion, the trial court did not clearly abuse its discretion in denying appellant's motion for severance. The facts reveal the crimes involve "the same type of offenses occurring over a relatively short period of time, in approximately the same location, and proof as to each transaction overlaps so as to evidence a common scheme or plan." *Glass v. State*, 1985 OK CR 65, ¶ 9, 701 P.2d 765, 768.

In reversing Appellant's convictions, the opinion relies on *Glass* and on *Atnip v. State*, 1977 OK CR 187, 564 P.2d 660, 663.[1] However, the opinion completely ignores more recent cases applying the principles set forth in *Glass*. *See e.g. Pack v. State*, 1991 OK CR 109, ¶ 8, 819 P.2d 280, 282-283 (trial court did not abuse its discretion in denying motion for severance with respect to separate burglaries -- eight weeks apart -- of elderly men for whom Appellant worked); *Brewer v. City of Tulsa*, 1991 OK CR 59, ¶ 12, 811 P.2d 604, 607 (in absence of a showing of prejudice or a clear abuse of discretion, Court allowed joinder of separate offenses occurring on separate buses during short amount of time); *Middaugh v. State*, 1998 OK CR 295, ¶ 10, 767 P.2d 432, 435

(separate crimes of uttering forged instruments and obtaining merchandise by bad check over a six-week period suggested a common scheme or plan); and *Vowell v. State*, 1986 OK CR 172, ¶ 8, 728 P.2d 854, 857 (where separate crimes of burglary of a home, murder of a passing motorist, and robbery of a convenience store the following day were found to be properly joined as a series of connected acts).

The crimes charged were connected by time, proximity, and evidence, and went beyond "mere similarity." *Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768. Indeed, there is suggestion in the record that the killings might have been racially motivated, as Appellant said he carried a gun because both victims were "racists." (Tr. at 1097.)

I agree there was no Fourth Amendment violation, although it seems to me the opinion attempts to fit a square peg into a round hole by trying to squeeze the facts of this case into the language used in 22 O.S.Supp.1998, § 1230. We need not go down that road. Assuming *arguendo*, the facts did not warrant nighttime service of a search warrant, where you have probable cause and exigent circumstances relating to the commission of a grave offense, as you do here, an officer may search a home without a warrant. *See Welch v. Wisconsin*, 466 U.S. 740, 750-51, 104 S.Ct. 2091, 2098-99, 80 L.Ed.2d 732 (1984).

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[1] Improper joinder was not even an issue in *Atnip*. Rather, that case dealt with the statutory "common scheme or plan" exception to other crimes evidence rule. See 12 O.S.1991, § 2404(B).

CHAPEL, J., CONCURRING IN RESULTS:

I concur in the decision to reverse and remand this case and in the analysis of the improper joinder issue. However, I cannot join the exigent circumstances analysis of 22 O.S.Supp.1998, § 1230. If the warrant was served before 6 a.m., the search was improper because the requisites of 12 O.S.Supp.1998, § 1230(3) were not met.