

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
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STATE OF OKLAHOMA

JAN 26 2006

MICHAEL S. RICHIE
CLERK

D.N.H.,)
)
Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

No. J-2005-1078

ACCELERATED DOCKET ORDER

On September 23, 2004, Appellant was charged as a Youthful Offender with First Degree Rape in Case No. CF-2004-566 in the District Court of Rogers County. Appellant's request to be certified as a juvenile was denied and that denial affirmed by this Court in an order entered May 19, 2005. *See, D.N.H. v. State*, J-2005-201, Not For Publication, May 19, 2005.

On February 4, 2005, the State filed a Motion to Sentence Appellant as an Adult. Appellant's trial was scheduled for September 12, 2005, and jury selection began on that date. On the morning of September 13, 2005, the State requested that the trial be stricken and that its Motion to Sentence Appellant as an Adult be heard. The trial was stricken, and the State's Motion was heard on October 12, 2005, at which time the District Court of Rogers County, the Honorable Dynda Post, District Judge, granted the State's Motion to Sentence Appellant as an Adult. From this ruling, Appellant appeals.

On appeal, Appellant raised three propositions of error:

1. The delay in the complaining witness bringing the allegations at issue and the delay by the State in filing charges and seeing the matter to hearing on the motion to certify as an adult has unduly prejudiced the defendant, which should cause this Court to dismiss this action;
2. The State can no longer pursue its motion for adult punishment because the trial commenced before the hearing on the motion was held; and
3. There was insufficient evidence produced to support the Court's finding that Appellant was not amenable to rehabilitation through the juvenile system.

Pursuant to Rule 11.2 (A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App.(2006) this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument January 19, 2006, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court. Appellant's case is **REVERSED and REMANDED** to the District Court of Rogers County with instructions to **VACATE** its order granting the State's Motion to Sentence Appellant as an Adult. In the event Appellant is convicted of the charged offense, he is to be treated as a Youthful Offender.

We find merit in Appellant's second proposition of error, therefore we will not address Propositions I and III in this order. Appellant argues that the State could not pursue its Motion to Sentence Appellant as an Adult because trial commenced prior to the time the hearing was conducted. The State argues that because the jury had not been empanelled, and jeopardy had not attached, it was proper to strike Appellant's trial and conduct the hearing on its Motion at a later date.

The State filed its Motion to Sentence Appellant as an Adult on February 4, 2005, pursuant to 10 O.S.2001 § 7306-2.8. That statute provides, in pertinent part, pursuant to § 7306-2.8(B) that

“Upon the filing of such motion *and prior to the trial* or before entry of the plea of guilty or *nolo contendere* the court *shall* hold a hearing to determine the matter.” (emphasis added)

The question here is whether, for purposes of this statute, trial began prior to the hearing on the State’s motion. We find that it did.

This Court has ruled on previous occasions that while jeopardy does not attach until the jury is empanelled, trial *begins* when jury selection begins. *Bowie v. State*, 1991 OK CR 78, ¶ 11, 816 P.2d 1143, 1147; *Wilkins v. State*, 157 P.2d 764, 80 Okl.Cr. 142, 152 (1954); *Cables v. State*, 3 Okl. Cr. 72, 104 P. 493 (1909); *Simmons v. State*, 4 Okl. Cr. 490, 114 P. 752 (1910). See also, Judge Parks’ special concur in *Bowie v. State*, 1991 OK CR 78, 816 P.2d 1143, 1149. There is no dispute that jury selection had not only begun, but had almost been completed at the time the trial court struck the trial and dismissed the jury. The trial court found that because the jury had not been empanelled, jeopardy had not attached. For purposes of this statute, however, the question is not when did jeopardy attach. The question in this instance is whether or not trial had begun for purposes of the State pursuing its Motion to Sentence as an Adult. Because the motion was not heard “prior to trial”, the district court erred when it dismissed the jury, after selection but prior to being empanelled, and subsequently conducted a hearing on the State’s Motion for Sentencing as an Adult.

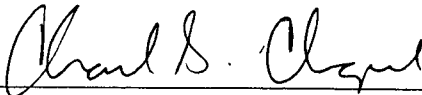
IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of four (4) to zero (0) that the order of the District Court of Rogers County granting the State's Motion to Sentence Appellant as an Adult in Case No. CF-2004-566 is hereby **VACATED**. This matter is **REVERSED AND REMANDED** to the District Court of Rogers County with instructions to treat Appellant as a Youthful Offender in the event of his conviction for the charged offense.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

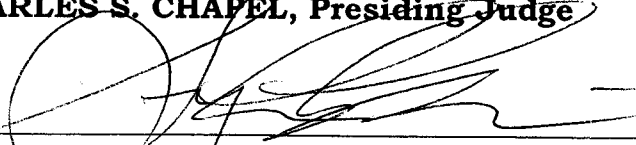
The Clerk of this Court is directed to transmit copies of this order to the District Court of Rogers County, the Honorable Dynda Post, Appellant, trial counsel, appellate counsel, the State of Oklahoma, and the Court Clerk of Rogers County.

IT IS SO ORDERED.

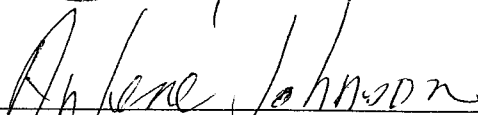
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of January, 2006.



CHARLES S. CHAPEL, Presiding Judge



GARY L. LUMPKIN, Vice Presiding Judge

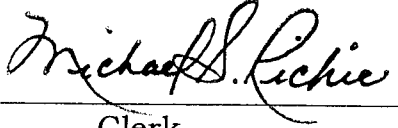


ARLENE JOHNSON, Judge



DAVID LEWIS, Judge

ATTEST:



Clerk

OA/F