FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 16 2006

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PAT LEE RICHARDSON,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2005-362
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Pat Lee Richardson, was convicted after a non-jury trial for First Degree Manslaughter, in violation of 21 O.S.2001, § 711(2), in Comanche County District Court, Case No. CF 2004-309. Appellant was sentenced to thirty-five (35) years imprisonment. From the Judgment and Sentence imposed, Appellant filed this appeal.

Mr. Richardson raises the following propositions of error:

1. Appellant's conviction should be reversed, because he had a complete defense, based on Oklahoma's "Make My Day Law;"

2. Appellant was denied effective assistance of counsel by trial counsel's failure to present an affirmative defense under the "Make My Day Law;"

3. Appellant's conviction should be reversed, based on the defense of justifiable homicide; and,

4. Appellant's sentence is excessive and should be modified.

After thorough consideration of the propositions raised, the Original Record, Transcripts, the arguments and briefs of the parties, we have

determined that Appellant's conviction should be affirmed, but his sentence modified for the reasons set forth below.

In Proposition One, under 21 O.S.2001, § 1289.25, commonly referred to as the "Make My Day" law,

> ... any occupant of a dwelling is justified in using any degree of physical force, including but not limited to deadly force, against another person who has made an unlawful entry into that dwelling, and when the occupant has a reasonable belief that such other person might use any physical force, no matter how slight, against any occupant of the dwelling.

This is an affirmative defense in criminal prosecutions for an offense arising from the reasonable use of force. 21 O.S.2001, § 1289.25(C). Appellant was not entitled to a defense under § 1289.25 as the uncontroverted evidence showed the victim did not enter Appellant's house but was standing on the front porch when he was stabbed. *Conover v. State*, 1997 OK CR 6, ¶ 56, 933 P.2d 904, 917-918.

Mulkey v. State, 1911 OK CR 41, 113 P. 532, relied upon by Appellant for the assertion that a home's porch satisfies the requirement of entry into a dwelling under the "Make My Day Law" defense is distinguishable from the specific provisions of § 1289.25 requiring entry into the home before the occupant can use force against the intruder.

Even if Appellant was entitled to protect himself while seated on his porch by stabbing the victim, he certainly was not entitled to stab the victim a second time as the victim lay on the ground already wounded. Accordingly, we find no error occurred in the trial court's failure to apply § 1289.25 to Appellant's case.

In Proposition Two, based upon our finding that the evidence did not support a defense under the "May My Day" law, we find trial counsel's failure to present a defense under § 1289.25 does not render the results of the trial unreliable. Therefore, counsel cannot be found ineffective. *Workman v. State,* 1991 OK CR 125, ¶ 19, 824 P.2d 378, 383.

In Proposition Three, we find the evidence did not warrant a finding of justifiable homicide. Justifiable homicide in self-defense occurs when one person, not at fault in bringing on the struggle, kills another under apparent necessity to save himself from death or great bodily harm. *Camron v. State,* 1992 OK CR 17, ¶ 13, 829 P.2d 47, 52; *see also* 21 O.S.2001, § 733. The apprehension of danger and the belief of the necessity which would justify killing in self-defense are not to be tested by the defendant's honesty or good faith but by whether the defendant had reasonable grounds to believe the killing necessary. *Camron*, 1992 OK CR 17, ¶ 13, 829 P.2d at 52. Self-defense is not available to a person who is the aggressor or who enters into mutual combat. *West v. State*, 1990 OK CR 61, ¶ 7, 798 P.2d 1083, 1085.

While the evidence shows the victim was certainly aggressive and antagonistic, there is no evidence to support a finding that Appellant was in fear of great bodily injury or that he believed killing the victim was the only way to save himself from harm. Appellant stabbed the unarmed victim who presented no serious threat to Appellant. Therefore, the trial court properly rejected the theory of justifiable homicide.

In Proposition Four, Appellant argues his sentence is excessive and should be modified. We agree. Under all the facts of this case, including the mitigating factors apparent from the record, the sentence imposed shocks the conscience of the Court, and we find the sentence should be modified to a term of twenty (20) years imprisonment. 22 O.S.2001, § 1066; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149.

DECISION

The Judgment of the trial court is hereby **AFFIRMED**, but the sentence is **MODIFIED** to a term of twenty (20) years imprisonment. 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.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE C. ALLEN McCALL, DISTRICT JUDGE

APPEARANCES AT TRIAL

DON GUTTERIDGE
5900 MOSTELLER DR., STE. 1100
ATTORNEY AT LAW
OKLAHOMA CITY, OK 73112
ATTORNEY FOR DEFENDANT

ROBERT C. SCHULTE
DISTRICT ATTORNEY
WILLIAM RILEY
ASST. DISTRICT ATTORNEY
COMANCHE COUNTY COURTHOUSE
LAWTON, OK 73501
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

S. GAIL GUNNING
O.I.D.S.
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
MATTHEW C. FLEISCHER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCUR
LUMPKIN, V.P.J. :	CONCUR IN PART/DISSENT IN PART
A. JOHNSON, J.:	CONCUR IN PART/DISSENT IN PART
LEWIS, J.:	CONCUR

RB

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

I concur in the Court's decision to affirm the judgment in this case. However, I cannot join in what I view as a disregard for the law and facts necessary to order a modification of the very reasonable sentence rendered by the trial judge acting as the trier of fact in a non-jury trial on the merits. There is no evidence in this record of emotion, prejudice, or outside influence which contributed to the trial judge's decision to sentence Appellant to 35 years for stabbing to death the unarmed victim.

The record shows that in response to the victim's request for Appellant to pay him $25.00 he was owed, Appellant retrieved a handgun, pointed it at the victim and cocked the hammer back. People at the scene convinced Appellant not to fire the gun. After the victim left the premises, Appellant retrieved a knife and placed it beside him as he waited for the victim to return. When the victim returned, he shouted at Appellant to return his money. Appellant responded by stabbing the victim. Appellant stabbed him a second time as he lay on the ground.

District Judge Alan McCall provided a very detailed, logical record reflecting a reasoned decision process, supported by the law and evidence as to both the conviction and the sentence. The record shows the trial judge fully considered all the facts and circumstances including evidence showing both Appellant and the victim were intoxicated, that Appellant initially wrote the victim a check which he could not readily cash, that the victim returned to

Appellant's home after having been told to leave the premises, that Appellant admitted to stabbing the victim but said he did not intend to kill him, that Appellant said he was sorry the victim had died, and that he admitted he could have handled the incident differently by going inside the house and calling the police.

In reality this Court has no basis upon which to modify this sentence other than certain members of the Court would not have imposed the same sentence as the trial judge. That is not the law, scope of review, or authority of this Court. I personally view this type of arbitrary action as a violation of the authority granted to us by the Oklahoma Constitution and the citizens of the State of Oklahoma.

The sentencing range for First Degree Manslaughter is not less than four (4) years. It was within Judge McCall's discretion to sentence Appellant to 4, 10, 20, 30, 50, 70, 80 years or more. But he didn't. He entered a very well reasoned sentence of only 35 years for the cold-blooded killing of an unarmed man. This Court should be true to its oath, find there is no abuse of discretion, that the sentence in no way shocks the conscience of the Court in accordance with *Rea v. State*, 2001 OK CR 28, 34 P.3d 148, and uphold the decision of the District Court by affirming the judgment and sentence.

A. JOHNSON, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I dissent only to the modification of the sentence in this case.