

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CLARENCE ANDRE GATEWOOD,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-829

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 17 2006

MICHAEL S. RICHIE
CLERK

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

C. JOHNSON, JUDGE:

Appellant, Clarence Andre Gatewood, was tried by jury for the crime of First Degree Murder (21 O.S.2001, § 701.7) in the District Court of Tulsa County, Case No. CF-2004-3607. The jury found Appellant guilty of the lesser offense of Second Degree Murder (21 O.S.2001, § 701.8(1)) and recommended a sentence of life imprisonment. On August 23, 2005, the Honorable Rebecca Nightingale, District Judge, sentenced Appellant in accordance with the jury's recommendation, and Appellant timely lodged this appeal.

Appellant raises the following propositions of error:

1. The trial court failed to notify defense counsel of a jury note, contrary to statutory mandate.
2. The trial court erred by denying the requested sentencing instruction.
3. The 85% instruction requirement of *Anderson v. State*, 2006 OK CR 6, should be applied to Appellant's case.
4. Admission of an involuntary confession was error.
5. Appellant's sentence is excessive.

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 conviction, but remand for resentencing.

In Proposition 4, Appellant claims his statement to police, implicating himself in the fatal assault on the victim, was involuntarily made, and that its admission into evidence denied him a fair trial. We disagree. The record shows that Appellant was advised of his rights before the interview, that he was sober and coherent, and that he spoke to police with full knowledge of the attendant consequences, free of any threat or promise. The trial court's conclusion that Appellant's statement was voluntarily made is soundly supported by the evidence. *Davis v. State*, 2004 OK CR 36, ¶ 37, 103 P.3d 70, 81. Proposition 4 is denied.

However, we find merit to Propositions 2 through 3. In *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, this Court held that juries should be instructed, where applicable, on statutory restrictions to parole eligibility found in 21 O.S. § 13.1 (the "85% Rule"). Appellant contends he is entitled to the same relief granted in *Anderson*, because (1) he timely raised the same issue below and on appeal, (2) during deliberations, the jury sent a note inquiring into the meaning of a "life" sentence with the possibility of parole, and (3) Appellant's case was pending on direct review at the time *Anderson* was decided. We agree. See *Anderson*, 2006 OK CR 6 at ¶ 10, 130 P.3d at 277-78; *Griffith v. Kentucky*, 479 U.S.314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Guy v. State*, 1989 OK CR 35, ¶ 21, 778 P.2d 470, 475. Accordingly, Appellant's conviction for Second Degree Murder is **AFFIRMED**, but his sentence is **VACATED** and the case is **REMANDED FOR RESENTENCING**. Our resolution of Propositions 2 and 3 renders Proposition 5 moot.¹

¹ In Proposition 1, Appellant claims the trial court failed to notify counsel about the jury's note before responding to it. Our reading of the record suggests counsel was in fact timely notified, but that the court again declined defense counsel's suggestion to instruct the jury on the 85% Rule. Proposition 1 is denied. *Welch v. State*, 1998 OK CR 54, ¶ 41, 968 P.2d 1231, 1245.

DECISION

The Judgment of the district court is **AFFIRMED**, but the sentence is **VACATED** and the case is **REMANDED FOR RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma 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 NIGHTINGALE, DISTRICT JUDGE

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OPINION BY C. JOHNSON, J.

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

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