IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDGAR ALLEN MOORE, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	))))))))	Not for Publication Case No. F-2005-1031

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 08 2006

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Edgar Allen Moore was tried by jury and convicted of Count I, Shooting with Intent to Kill in violation of 21 O.S.2001, § 652(A), and Count II, Knowingly Concealing Stolen Property in violation of 21 O.S.2001, § 1713, in the District Court of Caddo County, Case No. CF-2005-39. In accordance with the jury's recommendation the Honorable Wyatt Hill sentenced Moore to fifty (50) years imprisonment (Count I) and five (5) years imprisonment (Count II). Moore appeals from these convictions and sentences.

Moore raises four propositions of error in support of his appeal:

I. There was insufficient evidence to prove the crime of knowingly concealing stolen property beyond a reasonable doubt;

II. The prosecution improperly commented on Moore's silence to support its argument on the intent element of the charges;

III. Insufficient evidence existed to prove, beyond a reasonable doubt, the intent to take a human life element of the shooting with intent to kill count; and

IV. Because shooting with intent to kill sentences are subject to Oklahoma's eighty-five percent service rule, Moore's jury should have been instructed that any sentence imposed would be subject to that rule. The failure to so instruct denied Moore due process of law and a fundamentally fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Count II must be reversed with instructions to dismiss. The conviction in Count I is affirmed, but the count must be remanded for resentencing.

Moore claims in Proposition I that there was insufficient evidence to convict him of concealing stolen property. He is correct. The gun Moore used was stolen. To prove Moore knowingly concealed stolen property, the State had to show that he knew or had reasonable cause to believe that the gun was stolen, and that he concealed it from the owner.[1] Mere possession of stolen property is not enough; possession must be supplemented with facts inconsistent with honest possession.[2] The State called the gun's owner, Luttrell, to prove it was stolen. The State called a friend of Moore's, Eaves, who was with him at the time of the shooting. Eaves testified that he knew Luttrell's son. When Moore saw police coming to arrest him, he removed the clip from the gun and threw it on the ground. He then dropped to the ground himself, saying "I did it. Don't shoot me." This evidence does not support even an inference that Moore knew or reasonably should have known the gun was stolen, and no rational trier of fact could so find beyond a reasonable doubt.[3]

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[1] 21 O.S.2001, § 1713; *Antrobus v. State*, 1995 OK CR 41, 900 P.2d 1003, 1005; *Carter v. State*, 1979 OK CR 52, 595 P.2d 1352, 1354.

[2] *Antrobus*, 900 P.2d at 1005; *Brooks v. State*, 1986 OK CR 22, 714 P.2d 217, 219.

In Proposition II Moore complains that the prosecutor improperly referred to his right to remain silent.[4] During closing argument, the prosecutor first argued that there was no evidence of honest possession of the gun.[5] Moore's objection was overruled but the prosecutor was admonished to be careful. The prosecutor then argued that there was no evidence Moore intended to give the gun back to the owner, or that he called the police department to report that he had a stolen gun. Moore's counsel again objected. The objection was overruled but the prosecutor was admonished again. Finally, he argued that if a person has a gun and knows it is not stolen, "you come in front of law enforcement and you say, 'I bought this gun at a garage sale.' You put that fact in front of people who are deciding – ." Moore's objection was sustained and the jury was admonished to disregard the statement. This was a clear and erroneous reference to Moore's right to remain silent.[6]

The prosecutor's improper argument was not harmless. While the trial court twice admonished the prosecutor, only one objection was sustained to the two improper statements, and the single admonishment to the jury did not, under the circumstances of this case, cure the error.[7] No evidence suggested Moore knew the gun was stolen. The prosecutor urged jurors to make that

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[3] *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-04.

[4] Arguing *in camera* against Moore's demurrer to the evidence, the prosecutor said that the officer tried to ask Moore about the gun but Moore invoked his right to silence, and the prosecutor wasn't able to bring that out before the jury.

[5] This was not improper, as it was a correct statement that the evidence was uncontroverted.

[6] *Banks v. State*, 2002 OK CR 9, 43 P.3d 390, 405; *Dungan v. State*, 1982 OK CR 152, 651 P.2D 1064, 1065-66; *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965).

[7] *Banks*, 43 P.3d at 405 (improper argument, that defendant had not said anything showing he was accountable, cured when trial court admonished jury).

inference from the fact that Moore never said the gun was not stolen. Without that improper inference, jurors had no evidence from which to conclude Moore was in possession of stolen property. In combination with Proposition I, Proposition II requires that Count II be reversed and remanded with instructions to dismiss.

We find in Proposition III that any rational trier of fact could have found beyond a reasonable doubt that Moore intended to kill Holcomb when he shot at him.[8] We find in Proposition IV that Moore was entitled to an instruction on the 85% Rule. Persons convicted of the crime of shooting with intent to kill are required to serve 85% of their sentence. Moore's jury sent out a note asking how many years he would serve on a 30 year sentence before being eligible for parole, and another asking if there was a minimum sentence and possibility of parole on shooting with intent to kill. Moore's counsel noted this was an 85% crime and asked that the jury be so instructed. The trial court refused. This Court recently determined that juries should be instructed on the 85% rule.[9] Moore is entitled to consideration for relief on this issue as his appeal was pending in this Court when *Anderson* was decided.[10] The State appears to misunderstand the specific language of *Anderson*. *Anderson* provided that "failure to instruct on the 85% Rule *in cases before this decision* will not be

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[8] *Spuehler*, 709 P.2d at 203-04; 21 O.S.2001, § 652(A). Five eyewitnesses saw Moore point the gun directly at Holcomb and shoot as he walked toward him. Holcomb testified the gun was pointed at him and he thought he was going to die.
[9] *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 282.
[10] *Griffin v. Kentucky*, 479 U.S. 314, 327, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).

grounds for reversal."[11] A holding amounting to a change in criminal procedure will be applied retroactively to cases on appeal at the time it is issued.[12] *Anderson* does not apply to cases in which the appeal was final before it was issued, and does apply to prospective cases and cases on appeal when it was issued.

Moore asked for an instruction on the 85% rule and the trial court refused. The jury asked if there was a minimum sentence on the charge, if he could get parole, and how many years he would serve on a sentence of thirty years. Moore had no priors. Under the circumstances of this case, this Court should not speculate on what sentence a properly instructed jury would have recommended.[13] Count I must be remanded for resentencing.

Decision

The Judgment of the District Court as to Count I is **AFFIRMED**. The Sentence is **REVERSED** and Count I is **REMANDED** for **RESENTENCING**. The Judgment and Sentence as to Count II is **REVERSED** and Count II is **REMANDED** with instructions to **DISMISS**. 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.

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[11] *Anderson*, 130 P.3d at 283 (emphasis added).
[12] *Griffin*, *supra* note 8; *Rivers v. State*, 1994 OK CR 82, 889 P.2d 288, 291.
[13] *Hicks v. State*, 2003 OK CR 10, 70 P.3d 882, 883.

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OPINION BY: CHAPEL, P. J.

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

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULT

I concur in the fact the state failed to properly prove the Appellant knew the gun was stolen. Thus, Count II is properly reversed with instructions to dismiss.

I must concur in the results reached as to Count I by reason of *stare decisis*. However, the Court's statement the "State appears to misunderstand the specific language of *Anderson*" is just wrong. The State is correctly applying the language of *Anderson* and it is the Court that has not followed its own ruling that the decision was prospective only and would not be applied to cases tried before *Anderson*. I have previously written extensively on this very issue, but I recognize it has been to no avail and accede to the fact the Court is intent on applying *Anderson* to cases the opinion said it would not.

LEWIS, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I agree with the opinion as to the decision on Count II. Furthermore, I agree to affirming Count I; however, I dissent to remanding for re-sentencing, as it essentially requires a retrial of the case in the District Court. This Court can, in many instances, properly remedy violations of the *Anderson* rule by modifying the sentence. We should do so here without the necessity of a re-sentencing trial.