



RANGEL v. STATE

2023 OK CR 3

Case Number: F-2021-283

Decided: 03/09/2023

ANTHONY JESS COLDIRON RANGEL, Appellant v. THE STATE OF OKLAHOMA, Appellee



Cite as: 2023 OK CR 3, __ __

SUMMARY OPINION

HUDSON, VICE PRESIDING JUDGE:

¶1 Appellant, Anthony Jess Coldiron Rangel, was tried and convicted by a jury in the District Court of Oklahoma County, Case No. CF-2018-1415, of First Degree Felony Murder, in violation of 21 O.S. Supp. 2012, § 701.7(B). The jury sentenced Appellant to life imprisonment. The Honorable Natalie Mai, District Judge, pronounced judgment and sentence in accordance with the jury's verdict. Appellant must serve 85% of his sentence before he is parole eligible. 21 O.S. Supp. 2015, § 13.1(1).

¶2 Appellant now appeals and alleges the following proposition of error:

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT [APPELLANT'S] CONVICTION OF FELONY MURDER DURING THE COMMISSION OF DISTRIBUTION OF A DANGEROUS SUBSTANCE BECAUSE [APPELLANT] WAS THE BUYER IN THE TRANSACTION, THUS THE STATE DID NOT MEET ITS BURDEN IN PROVING THE UNDERLYING FELONY.

¶3 After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that Appellant's judgment and sentence must be **REVERSED AND REMANDED FOR NEW TRIAL**.

¶4 Appellant's first-degree felony murder charge was predicated on alternative factual theories. The State alleged the murder occurred *either* while Appellant was in the commission of robbery with a dangerous weapon *or* while in the commission of distribution of a controlled dangerous substance (marijuana).¹ In the end, the jury's guilty verdict was based on the jury's finding that the murder occurred while Appellant was in the commission of distributing marijuana.

¶5 In his sole proposition, Appellant contends the evidence shows he was a buyer, not a distributor of the marijuana. Relying on *Simms v. State*, 2021 OK CR 35, 499 P.3d 1236, Appellant argues that as a buyer he cannot be held liable as a principal to the underlying felony of drug distribution. He thus complains the State's evidence was insufficient to support his felony-murder conviction.

¶6 This is the second trip to this Court for Appellant on this claim. Prior to sentencing, Appellant filed a motion to dismiss and set aside the jury's verdict in district court. Citing this Court's recent decision in *Daniel v. State*, No. C-2019-15 (Okl. Cr., June 25, 2020) (unpublished), Appellant asserted the State erroneously charged him with felony-murder based on the theory of distribution as there was no evidence that he was anything other than a buyer or a recipient of marijuana. The State in its written response conceded the invalidity of Appellant's conviction based on *Daniel* and the State's erroneous argument at trial that Appellant, as a buyer, aided and abetted the distributor and was thus a principal to the felony drug distribution. The State asserted that modification of Appellant's sentence to first-degree manslaughter while endeavoring to possess a controlled dangerous substance was the appropriate remedy but contended the trial court lacked the authority to do so. For this reason, the State requested the district court proceed to formal sentencing and exercise its authority provided by 22 O.S. Supp. 2020, § 991a and suspend all but the first twenty-five years of Appellant's life sentence.

¶7 The trial court subsequently denied Appellant's motion to dismiss but vacated and set aside the jury's verdict based on this Court's ruling in *Daniel*. Judge Mai found evidence presented at trial indicated Appellant was one of several buyers in the drug transaction that led to the victim's death. Judge Mai granted a stay of the execution of her order of release pending appeal by the State. On January 15, 2021, this Court granted the State's Petition of Writ of Prohibition, finding the trial court lacked the legal authority to vacate the jury's finding of guilt. Appellant was formally sentenced on April 1, 2021.

¶8 We turn now to the case at hand and find Appellant's claim has merit. "[F]elony-murder is committed when a death results from a defendant's commission of certain enumerated felonies." *Simms*, 2021 OK CR 35, ¶ 8, 499 P.3d at 1239. "[O]ne is liable for felony murder only where they could also be charged with the underlying predicate crime." *Id.*, 2021 OK CR 35, ¶ 8, 499 P.3d at 1240 (quoting *Daniel*, No. C-2019-15, slip op. at 2 (Okl.Cr., June 25, 2020) (Rowland, J. Concurring in Results) (unpublished)). To be convicted as a principal to a crime, the evidence must show the defendant directly committed each element of the offense or aided and abetted another in its commission. 21 O.S.2011, § 172. With regard to the crime of drug distribution, we have specifically rejected the argument that the buyer, by seeking drugs, aids and abets the distributor of the drugs and is thus criminally liable as a principal to the felony drug distribution.² *Simms*, 2021 OK CR 35, ¶ 9, 499 P.3d at 1240. Thus, "[w]ithout evidence of something more than just receipt, the buyer/receiver of the controlled substances commits the crime of 'possession' and not 'distribution,' and [] cannot be charged as a principal to the distributor's crime of distribution." *Id.*, 2021 OK CR 35, ¶ 7, 499 P.3d at 1239.

¶9 The State tells us on appeal that Appellant did "something more," which transformed him into a principal to the victim's crime of distribution. We disagree. That Appellant purportedly acted as a lookout while he and his confederates attempted to obtain the drugs does not rise to the level of "something more." This evidence falls significantly short of proving Appellant was aiding and abetting the victim in the distribution.³ Nothing in the evidence shows that Appellant, as a lookout, was actively and directly acting on behalf of the victim to aid him in the commission of distribution. *Simms*, 2021 OK CR 35, ¶ 7, 499 P.3d at 1239 (an accomplice is one that participates in the same criminal conduct). *Compare, Hindman v. State*, 1982 OK CR 98, ¶¶ 6-9, 647 P.2d 456, 457 (evidence of a prearranged conspiracy between the seller and the defendant was sufficient to show that the defendant was more than a procuring agent for the buyer). At most, the evidence shows Appellant was aiding and abetting his confederate buyers to ensure their unlawful acquisition of the marijuana. The evidence was thus insufficient to show that Appellant and the victim had any type relationship other than buyer and seller. *See Simms*, 2021 OK CR 35, ¶ 7, 499 P.3d at 1239 ("Even though it can be said that both intend the sale to be made, this fact alone cannot be taken to mean the buyer as a matter of law is an accomplice of the seller."). Appellant's felony-murder conviction based on the underlying predicate crime of distribution must be **REVERSED**.

¶10 We must next determine the appropriate relief. Appellant argues retrial on the State's alternative robbery with a dangerous weapon theory is barred by the Double Jeopardy Clause. U.S. Const. Amend. V, XIV. He asserts the jury's silence impliedly acquitted him on the alternative robbery with a dangerous weapon theory and the lesser offense of second-degree murder during the commission of second-degree robbery. Appellant thus contends the only appropriate remedy is that of a new trial limited to the lesser offense of first-degree manslaughter while endeavoring to possess a controlled dangerous substance.⁴ Upon review, we find Appellant's original jeopardy for the State's alternative robbery with a dangerous weapon theory has yet to terminate.

¶11 Contrary to Appellant's assertion, it cannot be assumed in this case that the jury impliedly acquitted Appellant of these offenses. *See Simms*, 2021 OK CR 35, ¶ 11, 499 P.3d at 1240. Appellant was charged with alternative means of committing the same crime. His conviction on one of the two theories does not logically exclude a conviction on the alternative felony-murder charge. A partial acquittal cannot be inferred under these circumstances. *Id.* (citing *United States v. Feldman*, 931 F.3d 1245, 1256, 1257 (11th Cir. 2019)).

¶12 As in *Simms*, the verdict form in the present case reveals that the jury made no findings as to the State's alternative robbery with a dangerous weapon theory. Indeed, the verdict form is not materially different from those given in *Simms*. *Id.*, 2021 OK CR 35, ¶ 12, 499 P.3d at 1240-41. The jury's election of the State's distribution theory cannot be said to imply anything and does not equate to an implied acquittal on the State's alternative robbery with a dangerous weapon theory. Moreover, Appellant never voiced any objection to the jury's dismissal after the verdict and allowed the jury to be released without polling them on the alternative felony-murder theory. The total circumstances thus compel the conclusion that

Appellant impliedly consented to the dismissal of the jury without it having made a finding on the alternative felony-murder theory of robbery with a dangerous weapon. See *Feldman*, 931 F.3d at 1256-57 (a defendant's consent need not be express but may be implied from the circumstances).

¶13 For these reasons, we find Appellant's original jeopardy for first degree felony-murder while in the commission of robbery with a dangerous weapon has not terminated, and we **REMAND** the case to the District Court for a **NEW TRIAL** on this theory, along with the lesser offense of second-degree murder during the commission of second degree robbery, and the offense of first-degree manslaughter while endeavoring to possess a controlled dangerous substance.

DECISION

¶14 The Judgment and Sentence of the district court is **REVERSED AND REMANDED FOR A NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2023), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY THE HONORABLE NATALIE MAI, DISTRICT JUDGE

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OPINION BY: HUDSON, V.P.J.

ROWLAND, P.J.: CONCUR

LUMPKIN, J.: CONCUR IN RESULTS

LEWIS, J.: CONCUR IN PART/DISSENT IN PART

MUSSEMAN, J.: CONCUR

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 I concur in the result in this case based upon *stare decisis*. However, I disagree with the felony murder analysis in the context of drug cases as I espouse a broader view of the felony murder doctrine.

¶2 The doctrine of felony murder is set forth in 21 O.S.2012, § 701.7(B). That statutory section provides as follows:

A person also commits the crime of murder in the first degree, regardless of malice, when that person or any other person takes the life of a human being during, or if the death of a human being results from, **the commission** or attempted commission **of** murder of another person, shooting or discharge of a firearm or crossbow with intent to kill, intentional discharge of a firearm or other deadly weapon into any dwelling or building as provided in Section 1289.17A of this title, forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, eluding an officer, first degree burglary, first degree arson, **unlawful distributing or dispensing of controlled dangerous substances** or synthetic controlled substances, trafficking in illegal drugs, or manufacturing or attempting to manufacture a controlled dangerous substance. (emphasis added).

"Our cases require a nexus between the death of the victim and the underlying felony for the felony-murder doctrine to apply. . . The homicide charged must have been committed during the perpetration of the underlying crime." *Calvert v. State*, 2022 OK CR 19, ¶ 11, 517 P.3d 979, 983. (internal citations omitted).

¶3 In *Simms v. State*, 2021 OK CR 35, ¶ 9, 499 P.3d 1236, 1242, Lumpkin, J., dissenting, I reasoned, "the Legislature has clearly intended for the Felony Murder Doctrine to apply to third persons when their participation in felonious conduct results in the death of another." I found in *Simms* that the defendant CDS buyer's wrongful and potentially dangerous conduct was a substantial factor in causing the victim sellers' deaths during the commission of the crime of distribution of CDS; thus, the defendant CDS buyer committed first degree felony murder. It was **participation** in the felonious conduct of distribution, not criminal liability as a principal for committing distribution, that warranted affirmation of the defendant's conviction. Under my reading of the felony murder statute, there is no requirement that the defendant be a principal in the commission of the underlying crime. Felony murder can be committed when the death results from the commission of the underlying crime and the defendant's wrongful actions during that crime are a substantial factor in causing the victim's death.

¶4 In this case, the evidence showed Appellant knew the criminal purpose of meeting with Davis, *i.e.*, to get illegal drugs, and that Appellant had a gun, thus it was reasonably foreseeable that violence would occur during the drug deal.¹ By actively participating in the distribution of a controlled substance by serving as a lookout for all parties during the drug deal, Appellant was liable for Davis's death under the felony murder doctrine. *Cf. Kinchion v. State*, 2003 OK CR 28, ¶ 8, 81 P.3d 681, 684 (defendant was properly charged and convicted of first degree felony murder because it was reasonably foreseeable that a death could occur during the crime: defendant acted as lookout during the robbery, knew his co-defendant was armed and had knowledge of the criminal plan).

LEWIS, J., CONCUR IN PART AND DISSENT IN PART:

¶1 I respectfully dissent from reversing this conviction, for the reasons mostly set forth in my dissent in *Simms*. The Court's analysis continues to ignore the plain language of the felony murder statute, which was amended in 1996 to avoid exactly the kind of narrow, technical construction applied in *Simms*.

¶2 The statute defines felony murder as the killing of a human, regardless of malice, "when that person *or any other person* takes the life of a human being *during*, or if the death of a human being *results from*, the commission or attempted commission of . . . unlawful distributing . . . of controlled dangerous substances." 21 O.S.Supp.2012, § 701.7(B)(emphasis added).

¶3 The "any other person" language provides that one need not be a principal to the felony *drug* crime to violate this statute by killing someone *during*, or as a *result* of, that crime. The statute as written seeks to discourage just this kind of wrongful killing by *any* person involved in the underlying felony, not just the principal(s).

¶4 *Daniel*, *Simms*, *Polk*, this case, and others tragically show how buyers or pretended buyers of illegal drugs sometimes rob or murder the sellers--and others--to take their drugs or money (*Simms*), or kill a gangland rival (*Polk*). Properly interpreted, the statute punishes these killings while participating in a drug felony as first degree murder.

¶5 As the statute is currently misinterpreted, such convictions are reversed by this Court, and sometimes reduced to misdemeanor manslaughter on remand. This happened in *Simms* (where two people were foully murdered), and might happen here, too. Respectfully, this is not in keeping with the felony murder rule, nor is it justice. *Simms* and its progeny were wrongly decided and should be overruled.

¶6 I concur in the conclusion that the case should be remanded for a new trial on the charge that Appellant killed a human being during, or as a result of, the commission of robbery with a dangerous weapon. Appellant was neither convicted nor acquitted of that charge in the previous trial.

FOOTNOTES

HUDSON, VICE PRESIDING JUDGE:

¹ The jury was also instructed on the lesser offenses of second-degree murder during the commission of second-degree robbery and first-degree manslaughter while endeavoring to possess a controlled dangerous substance.

² The record shows, at bottom, that the State charged Appellant based on the legally flawed presupposition that Appellant, as a buyer, could be charged with the crime of distribution. In its final closing argument, the State argued:

Realize that the defendant in this case isn't the one who is giving the drugs. Cody Davis, in this case, is the drug dealer. Okay. But, again, we've instructed you on what a principal is: Aid, abet, or encourage. When you text your drug dealer and order up a quarter-ounce and a 40, you are encouraging that. You become a principal to the distribution. So by ordering the drugs, the defendant and his codefendants became principals to this.

³ The jury expressed confusion regarding the State's burden of proof for the underlying felony of distribution. During deliberations, the jury asked: "Can we get clarification of the definition of distribute above and beyond what was on number 16?" (Court's Ex. 2). Instruction No. 16 provided the definition for distribute provided in OUJI-CR (2d) No. 6-16 ("Distribute' means to deliver other than by administering or dispensing a controlled dangerous substance."). The trial court responded (on a separate sheet): "Read and re-read your instructions." See Agreed Order on Completion of the Record, ¶ 2 and corresponding attached exhibit.

⁴ Conversely, the State asks that if the evidence is found insufficient to support the jury's verdict, the case be remanded with instructions to modify to the lesser included offense of first-degree manslaughter while endeavoring to possess a controlled dangerous substance. However, if the Court is inclined to grant a new trial, the State argues trial on the charges of first degree felony-murder and second degree felony-murder during the commission of second degree robbery is not precluded.

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¹ In *Polk v. State*, 2022 OK CR 24, ¶ 22, 519 P.3d 107, 113, the majority, in affirming Appellant's conviction for First Degree Manslaughter, found that "the possibility of violence occurring during a street-level drug transaction of this type was reasonably foreseeable; and [Appellant's] act of driving [the actual killer to the seller's] location on the pretext of purchasing narcotics led directly to [the seller's] murder." However, recognition that violence in drug transactions is reasonably foreseeable is lacking in the instant case as it was in *Simms*.

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Cite	Name	Level
<u>2003 OK CR 28, 81 P.3d 681,</u>	<u>KINCHION v. STATE</u>	Discussed
<u>2021 OK CR 35, 499 P.3d 1236,</u>	<u>SIMMS v. STATE</u>	Discussed at Length
<u>2022 OK CR 19, 517 P.3d 977,</u>	<u>CALVERT v. STATE</u>	Cited
<u>2022 OK CR 24, 519 P.3d 107,</u>	<u>POLK v. STATE</u>	Discussed
<u>1982 OK CR 98, 647 P.2d 456,</u>	<u>HINDMAN v. STATE</u>	Discussed

Title 21. Crimes and Punishments

Cite	Name	Level
<u>21 O.S. 13.1,</u>	<u>Required Service of Minimum Percentage of Sentence - Offenses Specified</u>	Cited
<u>21 O.S. 172,</u>	<u>Definition of Principals</u>	Cited
<u>21 O.S. 701.7,</u>	<u>Murder in the First Degree</u>	Discussed at Length

Title 22. Criminal Procedure

Cite	Name	Level
<u>22 O.S. 991a,</u>	<u>Sentence - Powers of the Court</u>	Cited