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Court of Criminal Appeals Issue

Use of Wiretap Upheld Despite Errors

Evans v. State,, 2007 OK CR 13, Decided April 12, 2007

Harlan Evans, was convicted of numerous crimes in Case No. CF-2004-189 in Lincoln County District Court and was sentenced as follows:

Count 1: Conspiracy to Traffic in Methamphetamine
50 years & $200,000 fine;
Count 2: Unlawful Use of a Communication Facility
5 years & $5,000 fine;
Count 3: Conspiracy to Traffic in Marijuana
50 years & $100,000 fine;
Count 4: Trafficking in Meth
90 years & $200,000 fine;

Count 5: Distribution of Marijuana
90 years & $20,000 fine; and
Count 6: Trafficking in Meth
Life in prison & $200,000 fine.

Evans appealled his case and alleged that errors had occurred during his trial. First, he argued that his motion to suppress should have been sustained because of an inaccuracy in the search warrant. The Court held that although the police had listed the wrong physical address in the warrant, the detailed directions given in the search warrant were sufficient to enable police to find Appellant's home without difficulty. Therefore, the mistake did not render the warrant constitutionally invalid, and the trial court's denial of Appellant's motion to suppress was proper.

Next, Appellant claimed that the wiretap on his telephone was illegal because the district attorney failed to submit a written application for the order. He also aruged that normal investigative techniques were not exhausted prior to the issuance of the wiretap order. The Court held that there is no statutory requirement that a wiretap order be initiated by a written request from the district attorney; rather, such an order is predicated on an application submitted by the Attorney General, initiated by a law enforcement officer and authorized by the district attorney. As for the misdescription of Appellant's physical address, the Court found this to be immaterial because the order was directed not at a physical place, but at a mobile communications device whose assigned telephone number, serial number, and registered owner were all correctly identified. Finally, the wiretap application did, in fact, relate with particularity why other methods of investigation had proven, and would continue to prove, unsuccessful or inadequate. The State was not required to exhaust every other conceivable investigative tool before seeking a wiretap order.

As a result of their analysis, the Court upheld the Appellant's convictions and sentence.

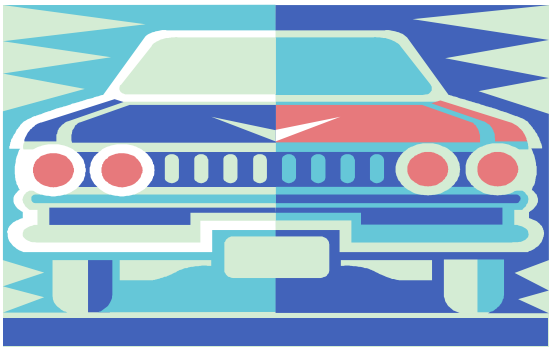
Conviction Leads to Possible Change in Jury Instructions

Goree v. State,, 2007 OK CR 21, Decided May 23, 2007

Wesley Darrell Goree was convicted in Kay County after a non-jury trial on Counts I and II, Assault and Battery with a Deadly Weapon in violation of 21 O.S.2001, § 652(C), and Count III, Intentional Discharge of a Weapon into a Dwelling in violation of 21 O.S.2001, § 1289.17A. These convictions were after two or more former felony convictions.

The trial judge sentenced Goree to twenty-five (25) years imprisonment on each of Counts I and II, and twenty (20) years imprisonment on Count III. Goree appealled from these convictions and sentences and raised several propositions of error in support of his appeal.

At approximately 4:00 a.m. on April 11, 2004, Goree fired several shots into a crowd of partygoers in front of a house. The home's owner and another guest were shot and injured. At least one bullet entered the house. As the shots began, a guest at the party shot



at Goree, injuring him. The victims and house were shot with Goree's gun. Goree claimed he began shooting after other shots were fired.

In the only proposition thoroughly examined by the Court, Goree claimed the trial court erred in allowing the State to modify the jury instructions by deleting the element of "intent to take a human life". The Court found that the amendment was proper because it specifically removed the element of intent to take a human life from the charges of Assault and Battery with a Deadly Weapon under 21 O.S.2001, § 652(C).

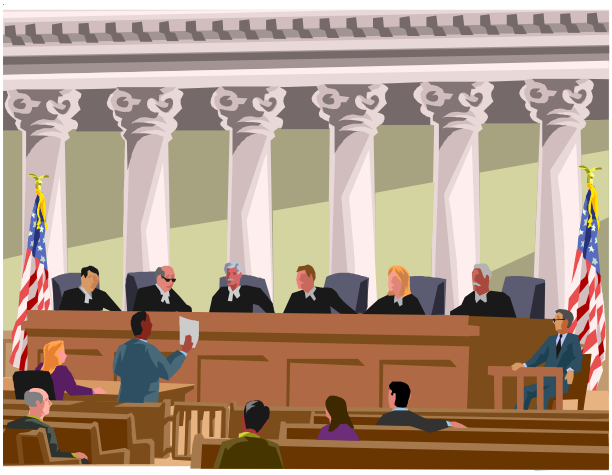
In its reasoning, the Court re-examined § 652(C) and its ruling in Burleson v. Saffle. In that case, the Court noted, "Assault and battery with a deadly weapon, as set forth in this statute, does not explicitly require an intent to injure or kill if the weapon or force used is likely to produce death."

Their conclusion was based on the current language of the statute, which was substantially revised in 1992. This revision divided § 652 into three separate sections. The Legislature separated the crime of shooting with intent to kill from the crimes of assault and battery with a deadly weapon and attempts to kill, and added a section specifically prohibiting drive-by shootings as a separate criminal offense.

The Court found that § 651(A) now clearly and explicitly requires intent to kill, while neither §§ 652(B) nor 652(C) have that specific requirement. Furthermore, the Court reasoned that reading an intent to kill element into § 652(B) (prohibiting drive-by shooting) would contravene the Legislature's decision to make persons liable for drive-by shooting "in conscious disregard for the safety of any other person or persons". The Court further reasoned that this language makes no sense if intent to kill is also an element of the crime. The Legislature could easily have included an intent requirement in § 652(C) as well. However, it did not, instead referring to an assault and battery "using a deadly weapon" or "by any means likely to produce death." Neither of these phrases, on their face, require the State to prove that the defendant intended to kill his victim.

The Court acknowledged that the Uniform Jury Instructions (OUJI) and previous cases include, as an element of assault and battery with a deadly weapon, the intent to take a human life. However, this prior view was based on the previous version of the statute. Given the current statutory language, the Court ruled that requiring the State to prove intent to kill for this crime would amount to adding an element not present in the statute. Therefore, the jury instruction on this crime should reflect this change in the law. In conjunction with this case, the Court decided to refer this issue to the Oklahoma Uniform Jury Instruction Committee to modify OUJI-CR(2nd) 4-6 by removing the fourth element, "intent to take a human life."

The Court overruled the remainder of Goree's claims and affirmed the Judgments and Sentences of the District Court.



Sentence Modified Over Double Jeopardy & Jury Issues

Lacy v. State,, 2007 OK CR 20, Published May 23, 2007

Appellant Lacy was tried by a Payne County jury and convicted of the following crimes:

Count I, Procuring Child Pornography
Count II, Distributing Child Porn; and
Counts III and IV, Contributing to the Delinquency of a Minor.

In accordance with the jury's recommendation the judge sentenced Appellant to ten (10) years imprisonment (Count I); fifteen (15) years imprisonment (Count II); and one (1) year in the county jail and a $1000 fine on each of Counts III and IV.

Lacy appealled his sentences and argued that the following errors had occurred in his case:

I. The trial court committed fundamental error by not informing the jury that Lacy would not be eligible for parole until he had served 85% of his sentence;

II. For the single act of allegedly encouraging his daughter to distribute pornography, Lacy was convicted of the felony of distributing pornography and also contributing to the delinquency of a minor; this violated the prohibitions against double jeopardy and double punishment and requires that one of the convictions be vacated;

III. Because Lacy allegedly had to procure the pictures in order to distribute them, it violated the prohibitions against double jeopardy and double punishment to convict him of one count of procuring the pictures, and a second count of distributing the pictures;

IV. Lacy was denied the right to cross-examine the chief prosecution witness regarding his theory of defense;

V. The trial court did not have jurisdiction to try Lacy as a repeat offender under the habitual criminal provision of 21 O.S.2001, § 51.1; and

VI. Ineffective assistance of counsel deprived Lacy of a fair trial.

After consideration of Appellant's claims, the Court found that the law and evidence required modification of his sentence. They further held that Count III should be dismissed.

The Court ruled that in Proposition II, under the specific language of the Information, Lacy's convictions for Count II, distributing child pornography, and Count III, contributing to the delinquency of a minor, violated the statutory prohibition against multiple punishment for a single act. As such, the Court

concluded that the conviction for Count III must be dismissed.

With respect to Proposition III, the Court held that Lacy's convictions for Counts I and II violated neither the prohibition against multiple punishment nor double jeopardy.

Additionally, the Court found merit in Proposition I. By statute, Appellant would have to serve 85% of his sentences on Counts I and II before being eligible to be considered for parole (the 85% Rule). The Court had prevously held in Anderson v. State that jurors should be instructed on the 85% Rule in every case to which it applies. Because his appeal was heard after Anderson, the Court found that Lacy was entitled to receive the benefit of that decision.

The State argued that the Court had held that the requirement to instruct on the 85% Rule did not apply to cases enhanced by prior convictions. However, the Court ruled that the State's claim was a "serious misreading" of prior caselaw. In Coates v. State, the defendant was convicted of unlawful distribution of methamphetamine within 2000 feet of a school. This is not an enumerated 85% Rule crime. Coates's sentence was enhanced with prior convictions which included both drug and non-drug offenses. The drug enhancement statute for Coates's crime, which applies only where all prior offenses are drug offenses, separately contains a provision requiring a defendant to serve 85% of his sentence. Coates claimed on appeal that, based on this separate drug enhancement statute, he should have received an 85% Rule instruction. However, Coates's sentence was not enhanced under this statute, but under § 51.1. As Coates's crime was not an 85% Rule crime, and he did not fall under the separate 85% Rule drug sentencing enhancement statute, this Court properly held that he was not entitled to an instruction on the 85% Rule. As such, the State misread this Court's reference to sentence enhancement in Coates to conclude that courts need not instruct on the 85% Rule in general sentence enhancement cases, because "the 85% Rule does not apply" to those cases. The Court found that this argument flatly contradicts the plain language of the 85% Rule statutes, which clearly applies to all convictions for the enumerated crimes. Therefore, the Court held that juries should be instructed on the 85% Rule in every case in which it applies, including cases where a defendant's sentence is enhanced under § 51.1.

Furthermore, the Court found no merit to Appellant's claims in Propositions IV, V, and VI.

Due to the Court's decision, the Judgments of the District Court on Counts I, II and IV were affirmed. The Judgment and Sentence on Count III was reversed with instructions to dismiss. The Appellant's sentences were also modificed to run concurrently.

NOTICE

The Legal Eagle is a news publication for law enforcement officers and is not designed to give legal advice. You should always contact your police legal advisor, municipal attorney, or district attorney concerning legal matters.

85% Rule Causes Court to Withdraw Plea

Pickens v. State,, 2007 OK CR 18, Published May 4, 2007

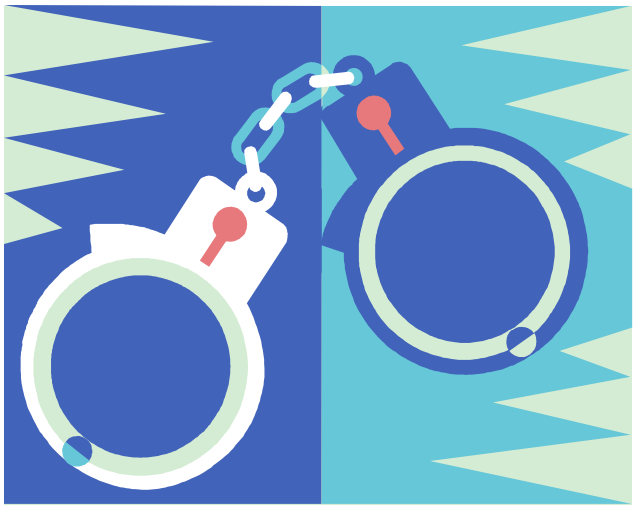
The Appellant entered a guilty plea in Carter County District Court to Counts I, II, and III: Rape in the First Degree by Instrumentation; and Count IV: Lewd Molestation.

On June 28, 2006, the lower court judge sentenced Appellant Pickens to the following sentences: Counts I, II, and III: five (5) years imprisonment for each count; and Count IV: one (1) year imprisonment. The trial court judge ruled that the sentences were to be served consecutively.

On July 7, 2006, Appellant Pickens timely filed an Application to Withdraw his plea, which was subsequenlty denied by the lower court. Appellant Pickens appealled the trial judge's decision to the Oklahoma Court of Criminal Appeals and argued that his plea was involuntarily entered.

In his appeal, Pickens acknowledged that he would have to serve 85% of each sentence before being eligible to be considered for parole (otherwise known as the 85% rule). However, the Court of Criminal Appeals determined that the Appellant was not notified of the 85% rule until after the lower court accepted his plea. Therefore, Pickens argued, as a consequence, his pleas were not knowingly and voluntarily entered.

The Court of Criminal Appeals has previously held that a defendant has a right to know whether his sentences are subject to the 85% Rule when entering a negotiated plea.

In this case, the Court reaffirmed that decision and further concluded that a defendant has a right to be informed of the 85% Rule when entering any plea, whether it is a negotiated sentence or a blind plea (one in which a sentencing agreement has not been made) to the trial court.

As a result of this reasoning, the Court of Criminal Appeals held that the lower court's failure to advise the Appellant of the 85% Rule rendered his plea involuntary. As a result, he must be allowed to withdraw his pleas, and his case was remanded to the trial court for further proceedings.