

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Appellant,

v.

**MICHAEL ALLEN MIERS (E) and
ANDREA ROBERTS MAE
GREGOIRE (F),**

Appellees.

NOT FOR PUBLICATION

No. S-2016-332

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

JAN - 5 2017

**MICHAEL S. RICHIE
CLERK**

OPINION

PER CURIAM:

On September 15, 2015, a multi-county grand jury indictment was filed in Mayes County Case No. CF-2015-248 charging Appellees Miers and Gregoire with Count 1, Conspiracy to Deliver a Narcotic Controlled Dangerous Substance (CDS), and Count 2, First Degree Murder.¹ A preliminary hearing was conducted before the Honorable Rebecca Gore, Special Judge. On March 22, 2016, Judge Gore sustained, in part, the demurrers filed by Miers and Gregoire, dismissing the murder charges against both defendants. The State appealed Judge Gore's ruling pursuant to Rule 6.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016) and 22 O.S.2011, § 1089.1. The appeal was assigned to the Honorable Barry Denney, Associate District Judge, and a hearing was conducted April 7, 2016. Judge Denney affirmed Judge Gore's order sustaining, in part, the demurrers filed by Miers and Gregoire. From this ruling, the State appeals and raises the following issue:

¹ A total of five defendants were indicted in Mayes County Case No. CF-2015-248, all charged with conspiracy and first degree murder.

1. The reviewing judge erred in holding that Andrea Gregoire was “forced out” of the conspiracy thereby absolving her of any co-conspirator liability for the death of Jennifer McNulty and in holding that Michael Miers withdrew from the conspiracy also absolving him of co-conspirator liability for the death of Jennifer McNulty.

Judge Denney’s ruling, with respect to these two defendants, is **AFFIRMED**.

Jennifer McNulty was found dead on October 25, 2014, the result of acute oxycodone intoxication. After a lengthy investigation, the victim’s son, AyJay McNulty, Jennifer McCormack, Christina Dempsey, and Appellees Miers and Gregoire were all jointly indicted by the multi-county grand jury and charged with conspiracy and first degree murder. At the conclusion of the preliminary hearing, Judge Gore made several findings of fact regarding each of the defendants. The findings relevant to this appeal were that Gregoire and Miers each withdrew from the conspiracy prior to Jennifer McNulty’s death, and their respective demurrers to the First Degree Murder charge were granted.

In reviewing Judge Gore’s ruling, Judge Denney found that Gregoire was forced out of the drug distribution conspiracy and was no longer part of the conspiracy for several months before McNulty’s death. Judge Denney found that Miers ended his relationship with McCormack on or about October 1, 2014, moving to Colorado at that time, and returning to Pryor in January 2015 at which time he resumed his business relationship with McCormack and his involvement in the conspiracy. The court found that Miers’s actions which culminated in his move to Colorado constituted effective notice to the other members of the conspiracy that he withdrew from the conspiracy for the months of October, November and December

of 2014. Judge Denny found that Gregoire and Miers both withdrew from the drug selling conspiracy prior to Jennifer McNulty's death and could not be charged with felony murder. Finding that Gregoire and Miers were no longer part of the conspiracy at the time of McNulty's death, Judge Denney affirmed Judge Gore's findings granting the demurrers filed by Gregoire and Miers as to the First Degree Murder charge.

We review the District Court's ruling for abuse of discretion. *State v. Salathiel*, 2013 OK CR 16, ¶ 7, 313 P.3d 263, 266. The State's evidence at preliminary hearing established, through its own witnesses, that Gregoire conspired with McCormack to distribute drugs. However, Gregoire was arrested in April 2014, and upon her release in May 2014, the other members of the conspiracy, namely McCormack and Dempsey, refused to allow Gregoire to continue selling and distributing drugs with them. Gregoire's severe drug addiction made her an unreliable partner, and her failure to submit payment to McCormack and Dempsey for drugs resulted in her removal from the drug selling chain by these two co-defendants. As for Miers, the State's witnesses confirmed that he participated in a drug selling conspiracy with McCormack. Testimony at the hearing was that Miers argued with McCormack in September 2014, and terminated his business relationship with her, took his client list with him and moved to Colorado in early October 2014. Miers returned to Mayes County and resumed his business relationship with McCormack in January 2015.

On the facts presented in this case, we find no abuse of discretion in the District Court's ruling affirming Judge Gore's order granting the demurrers filed by Gregoire and Miers and dismissing the felony murder charges against these two co-defendants.

DECISION

The order of the District Court of Mayes County affirming the magistrate's ruling granting, in part, demurrers filed by defendants Miers and Gregoire dismissing felony murder charges against the two co-defendants, in Mayes County Case No. CF-2015-248, is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY
THE HONORABLE BARRY DENNEY, ASSOCIATE DISTRICT JUDGE

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OPINION BY: PER CURIAM

LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
SMITH, J.: CONCUR
HUDSON, J: DISSENT

RA/F

HUDSON, J., DISSENTING

I would reverse the district court's order sustaining the magistrate's demurrer of the first degree murder charges in this case against Appellees. The district court's decision was an abuse of discretion in that it was unreasonably taken without proper consideration of the facts and law pertaining to the matter at issue. See *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (defining abuse of discretion). Here, Miers and Gregoire did not withdraw from the established conspiracy to distribute narcotics they previously entered prior to the victim's death. "Withdrawal requires letting the other parties know of one's abandonment and doing everything in one's power to prevent the commission of the crime." *Johnson v. State*, 1986 OK CR 134, ¶ 9, 725 P.2d 1270, 1273. The most that can be said of the appellees' conduct is that Miers temporarily absented himself from daily involvement in the drug distribution enterprise with Jennifer McCormack (which he quickly resumed after returning from Colorado) and that Gregoire continued to assist McCormack with the daily workings of this criminal enterprise. On this record, the district court abused its discretion in failing to order bindover of the appellees on first degree murder as charged by the State. I therefore dissent to today's decision.