

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
JUL 18 2007

JEREMY DION NICHOLSON,)
)
Appellant,)
)
-vs-)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

MICHAEL S. RICHIE
 CLERK

No. M-2006-370

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant appeals from his misdemeanor citations for six counts of Direct Contempt of Court imposed by the Honorable Twyla Mason Gray, District Judge, during the trial of Appellant’s co-defendant in Case No. CF-2004-1212 in the District Court of Oklahoma County. Petitioner was sentenced to six months in the Oklahoma County Jail on each of the contempt citations, to run consecutively.

On appeal Appellant raises the following propositions of error:

1. The convictions were a violation of Mr. Nicholson’s right to remain silent.
2. The trial court erred by holding Mr. Nicholson in contempt for not testifying because Mr. Nicholson’s case is still on appeal.
3. The district judge violated Mr. Nicholson’s right to be free from double jeopardy.
4. The trial court erred by assuming the role of the prosecutor in this case.
5. Cumulative error deprived Mr. Nicholson of a fair proceeding.

In supplemental briefing to propositions 1 and 2, Appellant claims this Court's recently decided case of *Myers v. State*, 2007 OK CR 8, 154 P.3d 714, is directly on point and controls this appeal.¹ The State counters by noting that in *Myers* this Court was not required to address the situation where the defendant was granted immunity from the use of compelled testimony. The State still argues that because Appellant was granted immunity he was not excused from testifying and his contempt citation does not violate his right to remain silent. We find that the State is correct.

During trial proceedings for Appellant's co-defendant in Case No. CF-2004-1212, the prosecutor advised the District Court that the State would not use Appellant's testimony in any future proceedings and Judge Gray granted use immunity for the testimony. Section 27 of Article II of the Oklahoma Constitution provides:

Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation under the laws of the state shall not be excused from giving testimony or producing evidence, when legally called upon so to do, on the ground that it may tend to incriminate him under the laws of the state; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence. All other provisions of the Constitution or the laws of this state in conflict with the provisions of this constitutional amendment are hereby expressly repealed.

Okla. Const. Art. II, § 27. This Court has recognized that “[i]t has been consistently held that testimony may properly be compelled from a witness in

¹ *Myers* held that a defendant whose appeal had not become final could still invoke the privilege against self-incrimination and refuse to testify at the trial of a co-defendant even if the defendant had previously waived the privilege and testified at his own trial.

State proceedings regardless of the Fifth Amendment privilege, if there is immunity from federal and State use of the compelled testimony in any subsequent prosecution of the Witness.” *Clem v. State*, 1985 OK CR 66, ¶20, 701 P.2d 770, 774.

Immunity from future use of testimony was lawfully extended to Appellant when the District Court denied his claimed privilege of silence and compelled him to testify, and when immunity was approved by the District Court and agreed to by the prosecuting attorney. *Coleman v. State*, 70 Okl.Cr. 246, 104 P.2d 1004 (1940). Once Appellant was legally granted immunity from prosecution for the use of any testimony he would have given during the trial of his co-defendant, he was not excused from testifying on the basis of the privilege of silence. *Nuckols v. Van Wagner*, 1973 OK CR 278, ¶5, 511 P.2d 1110, 1112; *see also Clem, supra*; Okla. Const. Art. II, § 27. Thus, Appellant’s privilege against self-incrimination was not still existent, and his refusal to testify serves as a ground for a conviction for the offense of direct contempt of court. *Cf. Nuckols*, 1973 OK CR 278 at ¶7, 511 P.2d at 1112.

The State concedes Appellant’s third proposition that he only committed one count of contempt of court. Thus, five of the counts of contempt of court should be reversed and remanded to dismiss.

Appellant hasn’t established that the trial court erred by Assuming the role of the prosecutor in this case. Judge Gray did not did not have ex parte communications with the prosecution or indicate any predetermination of the proceedings. *Cf. Jones v. State*, 1983 OK CR 127, 668 P.2d 1170; *C.R.B. v.*

State, 1978 OK CR 22, 575 P.2d 636. Judge Gray was attempting to manage the trial of Appellant's co-defendant, Morris III, and was actually trying to protect Appellant by granting him immunity for any testimony he would give.

On the claim of cumulative error, Appellant was granted relief on his double jeopardy claim in proposition 1, and hasn't established entitlement to any more relief than that. Where Appellant hasn't demonstrated error in the other propositions, there can't be an accumulation of error. *Clayton v. State*, 1995 OK CR 3, ¶27, 892 P.2d 646, 657.

DECISION

Appellant's citation for one count of Direct Contempt of Court and his sentence on that count of six months in the County Jail, which was issued in Case No. CF-2004-1212 in the District Court of Oklahoma County, is **AFFIRMED**. Appellant's citations for the five other counts of Direct Contempt of Court and his sentences on those counts of six months in the County Jail, issued in Case No. CF-2004-1212 in the District Court of Oklahoma County, are **REVERSED** and **REMANDED** with instructions to dismiss. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
C. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: DISSENT
A. JOHNSON, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR

RE

CHAPEL, JUDGE, DISSENTING:

It appears to me that Appellant has a good point about the judge in this case acting as a prosecutor. Apparently the judge was affronted that someone would refuse to testify. She then set about to get that testimony for the State by suggesting the State agree not to use the testimony in the future. I think this was improper conduct on the part of a judge who is supposed to be a neutral arbiter.

Furthermore, I think that while the memo and Opinion conclude that there was an immunity agreement, it is not absolutely clear to me that there was a deal. Immunity agreements in my judgment need more specificity in my opinion than what we had here.