

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THOMAS TERRILL,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-527

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 09 2006

MICHAEL S. RICHIE
CLERK

S U M M A R Y O P I N I O N

C. JOHNSON, JUDGE:

Appellant, Thomas Terrill, was charged by Information in Pushmataha County District Court, Case No. CF-2004-71, with First Degree Murder (21 O.S.2001, § 701.7). A jury found him guilty of the lesser related offense of First Degree Manslaughter (21 O.S.2001, § 711), and recommended a sentence of life imprisonment. The Honorable Willard Driesel, District Judge, sentenced Appellant in accordance with the jury’s recommendation on April 7, 2005. Appellant timely lodged this appeal.

Appellant raises the following propositions of error:

1. The evidence was insufficient to sustain a conviction for First Degree Manslaughter.
2. Prosecutor misconduct denied Appellant a fair trial.
3. The sentence imposed is excessive, and the jury considered the parole process in determining sentence.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the conviction, but remand for resentencing. As to Proposition 1, we find the evidence was sufficient for a rational trier of fact to reject Appellant’s claim of self-defense, and to conclude, beyond a reasonable

doubt, that Appellant killed the decedent in a heat of passion. [CITE] Proposition 1 is denied.

However, we find that Propositions 2 and 3 warrant relief. As to Proposition 2, by evoking sympathy for the victim and his family in his closing argument, and claiming that “If you take a life, you give a life,” the prosecutor asked the jury to base its sentence recommendation on improper factors. Appellant timely but unsuccessfully objected to these comments, and asked that the jury be admonished to disregard them. Such comments are improper. *Wilson v. State*, 1998 OK CR 73, ¶ 102, 983 P.2d 448, 470-71; *Gibson v. State*, 1972 OK CR 249, ¶ 43, 501 P.2d 891, 900-01. As to Proposition 3, the jury sent a note during deliberations asking the trial court about parole eligibility. Consistent with the law on the subject at that time, the trial court declined to offer any further guidance and referred the jury to its previous instructions. However, in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, this Court held that juries should be instructed, where applicable, on statutory restrictions to parole eligibility found in 21 O.S. § 13.1. Because Appellant’s case was pending on direct appeal when *Anderson* was decided, and because he raised this issue in his opening brief, which was filed before *Anderson* was decided, we find that Appellant is entitled to the same consideration granted in *Anderson*.¹ See *Griffith v. Kentucky*, 479 U.S.314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Guy v. State*, 1989 OK CR 35, ¶ 21, 778 P.2d 470, 475. Together, the issues raised in Propositions 2 and 3 convince us that a new sentencing proceeding is in the best interests of justice.

¹ Appellant’s motion for leave to file a supplemental brief, addressing *Anderson*’s effect on Proposition 3, is **GRANTED**. See Rule 3.4(F), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 O.S., Ch. 18, App. (2006) (“A supplemental brief, if necessary to present new authority on issues previously raised, may be filed if granted leave of Court”).

DECISION

The Judgment of the district court is **AFFIRMED**, but the sentence is **VACATED** and the case is **REMANDED FOR RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PUSHMATAHA COUNTY
THE HONORABLE WILLARD DRIESEL, DISTRICT JUDGE

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OPINION BY C. JOHNSON, J.

CHAPEL, P.J.:	CONCURS
LUMPKIN, V.P.J.:	CONCURS IN RESULTS
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS IN RESULTS